

B. The Decision in Jardines

The Supreme Court extensively discussed knock and talks for the first time in Florida v. Jardines.¹ In that case, police brought a drug-sniffing dog to the defendant's home to investigate a suspected marijuana growing operation.² The dog went onto the front porch and alerted for drugs.³ Using this information, the police secured a warrant.⁴ The Court held that using a police dog to sniff for drugs within the curtilage of the home is a search under the Fourth Amendment and requires a warrant.⁵ Justice Scalia distinguished this behavior from a knock and talk, saying that while a knock and talk was permitted under an implied social license, taking a police dog within the curtilage to search for drugs was not covered by any implied license and required a warrant.⁶ The implicit license "typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave."⁷ The license is also limited in scope "to a specific purpose . . . the background social norms that invite a visitor to the front door do not invite him there to conduct a search."⁸ Since the dog was there to explore around the home and sniff for evidence, this exceeded the scope of the social license.

It is important to note that Justice Scalia's opinion relies upon "the traditional property-based understanding of the Fourth Amendment."⁹ Early Fourth Amendment

¹ Florida v. Jardines, 569 U.S. 1 (2013).

² Id. at 3–4.

³ Id.

⁴ Id.

⁵ Id. at 11–12.

⁶ See id. at 8–10.

⁷ Jardines, 569 U.S. at 8.

⁸ Id. at 9.

⁹ Id. at 11.

jurisprudence understood the Amendment as protecting property interests.¹⁰ The English common law case Entick v. Carrington,¹¹ described by the Supreme Court as “undoubtedly familiar to every American Statesman at the time of the founding,” stated that “[O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave.”¹² Applying this axiom, courts considered whether the government had intruded on the defendant’s property when analyzing Fourth Amendment issues.

This understanding contrasts with the now common privacy-based understanding of the Fourth Amendment stated in Katz v. United States.¹³ Under Katz, courts have looked to whether police have invaded an area where there is a “reasonable expectation of privacy.”¹⁴ Katz famously rebuffed a purely property-based interpretation of the Fourth Amendment, with the Court saying “[T]he Fourth Amendment protects people, not places.”¹⁵ But the Court in Jardines said it did not need to determine whether there was a reasonable expectation of privacy from a police dog sniffing on the front porch.¹⁶ A Katz analysis was unnecessary because the police had already violated the Fourth Amendment by obtaining information by physically intruding on Jardines’s property.¹⁷ A solely property-based analysis was acceptable because “The Katz reasonable-expectations test ‘has been added to, not substituted for,’ the traditional property-based understanding of the Fourth Amendment.”¹⁸

¹⁰ See, e.g., Olmstead v. United States, 277 U.S. 564 (1928) (holding that a wiretap without a warrant was admissible evidence because telephone wires outside of the home are not property protected under the Fourth Amendment), overruled by Katz v. United States, 389 U.S. 347 (1967)).

¹¹ [1765] 95 Eng. Rep. 807.

¹² Jardines, 569 U.S. at 2.

¹³ 389 U.S. 347 (1967).

¹⁴ Id. at 360 (Harlan, J., concurring).

¹⁵ Id. at 351.

¹⁶ Jardines, 569 U.S. at 11.

¹⁷ Id.

¹⁸ Id. (quoting United States v. Jones, 565 U.S. 400, 409 (2012)).

In a concurrence, Justice Kagan suggested that she thought the case could be decided on privacy grounds as well as property grounds.¹⁹ Justice Kagan argued that such an opinion would insist that “privacy expectations are most heightened in the home and the surrounding area.”²⁰ But the concurrence also noted that “the law of property naturally enough influence[s] our shared social expectations of what places should be free from governmental incursions.” And as a result, “the sentiment “my home is my own,” while originating in property law, now also denotes a common understanding—extending even beyond that law’s formal protections—about an especially private sphere.”

III. THE CHAOTIC STATE OF CURRENT KNOCK AND TALK JURISPRUDENCE

A. Courts that View Jardines as Limiting the Knock and Talk to the Front Door

The Third Circuit attempted to address the new role of Jardines in Carman v. Carroll,²¹ a § 1983 action against police officers who warrantlessly entered Carman’s property and went directly to the back door.²² The Third Circuit used the language of Jardines alongside its own precedent to hold that a knock and talk must begin at the front door.²³ The Third Circuit also determined that the officers were not entitled to qualified immunity, even though the police action in the case had occurred prior to the decision in Jardines.²⁴ The Supreme Court reversed, holding that the rights at issue were not clearly established at the time of the offense, and so the officers were entitled to qualified

¹⁹ Id. at 13 (Kagan, J., concurring).

²⁰ Id. (quoting California v. Ciraolo, 476 U.S. 207, 213 (1986)) (internal quotation marks omitted).

²¹ 749 F.3d 192 (3rd Cir. 2014).

²² Id. at 197.

²³ Id. at 199.

²⁴ Id.

immunity.²⁵ The per curiam decision explicitly declined to state whether a knock and talk must begin at the front door.²⁶

The First Circuit also likely views Jardines as restricting police to approaching the front door. In French v. Merrill,²⁷ police attempted a knock and talk but got no response.²⁸ As the officers were leaving, one of them noticed a figure at a window, who quickly covered the window and turned out the lights upon being spotted.²⁹ The police then went back to the front door and knocked again, and after receiving no response, went to the side of the house and knocked on the occupant's bedroom window frame.³⁰ The First Circuit found that the police officers did not have qualified immunity from a § 1983 claim because their behaviors clearly violated the law that had been established in Jardines.³¹ The Court noted that the officers' continued attempts to knock on the door, as well as the knocking at the window, exceeded the customary social license set out in Jardines to "approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave."³²

The Eighth Circuit requires police to knock at a door at the front of the house, and does not allow police to directly proceed to the back of the house.³³ In United States v. Wells,³⁴ the court considered a case where police proceeded directly into the backyard of a house to investigate reports of a methamphetamine lab being run from a rear building.³⁵

²⁵ Carroll v. Carman, 574 U.S. 13, 17–20 (2014) ("But whether or not the constitutional rule applied by the court below was correct, it was not 'beyond debate.'").

²⁶ Id. at 20 ("We do not decide today . . . whether a police officer may conduct a "knock and talk" at any entrance that is open to visitors rather than only the front door").

²⁷ 15 F.4th 116 (1st Cir. 2021).

²⁸ Id. at 129.

²⁹ Id.

³⁰ Id.

³¹ Id. at 130.

³² Id. (quoting Florida v. Jardines, 569 U.S. 1, 8 (2013)).

³³ See United States v. Wells, 648 F.3d 671, 680 (8th Cir. 2011).

³⁴ Id.

³⁵ Id. at 673.

Once in the backyard, police conducted a knock and talk at the back door, and when resident answered, police smelled marijuana and discovered drugs.³⁶ The Eighth Circuit determined that this knock and talk had violated the Fourth Amendment, saying “We are not prepared to extend the “knock-and-talk” rule to situations in which the police forgo the knock at the front door and, without any reason to believe the homeowner will be found there, proceed directly to the backyard.”³⁷

B. Courts that Expand the Knock and Talk License to Cover the Curtilage Generally

The Fourth and Eleventh Circuits have held that the police may conduct knock and talks beyond the front door of the house, and that the exception even extends to circumstances where the police do not knock on a door.³⁸

In United States v. Walker,³⁹ police officers knocked on the front door of a house, got no response, and left.⁴⁰ Later that night, instead of approaching the front door again, the officers went to a carport that was adjacent to a house and knocked on the car’s window.⁴¹ The defendant, who was sleeping inside the car, answered to the police and was arrested for evidence the police subsequently found in plain view.⁴² The Eleventh Circuit first held that the police had not objectively revealed a purpose to search under Jardines; rather, they had simply approached to speak with the homeowner.⁴³ Walker found this to be “squarely within the scope of the knock and talk exception.”⁴⁴ The court also held that knocking on the car window was permitted under the knock and talk exception because it was only a

³⁶ Id.

³⁷ Id. at 680.

³⁸ See Covey v. Assessor of Ohio Cnty., 777 F.3d 186 (4th Cir. 2015); see also United States v. Walker, 799 F.3d 1361 (11th Cir. 2015).

³⁹ 799 F.3d 1361 (11th Cir. 2015).

⁴⁰ Id.

⁴¹ Id. at 1362–63.

⁴² Id.

⁴³ Id. at 1363.

⁴⁴ Walker, 799 F.3d at 1363.

“small departure from the front door,”⁴⁵ which the Eleventh Circuit considers permissible.⁴⁶

To further bolster the argument that police can go beyond the front door, the court quoted an Eighth Circuit opinion that held that “that law enforcement officers must sometimes move away from the front door when attempting to contact the occupants of a residence,” though in that case the officer walked around the house in order to serve a defendant with process.⁴⁷ The Eleventh Circuit further said it was not unreasonable to conduct a knock and talk at 5:04 a.m. because a light was on in the car.⁴⁸

In the Fourth Circuit’s view, “although the knock-and-talk doctrine is sometimes framed as a right to approach the home by the front path or knock on a front door . . . we have made clear that the implicit license is broader than that.”⁴⁹ In Covey v. Assessor of Ohio Cnty.,⁵⁰ officers received a tip that the defendant was growing marijuana behind his home. The officers then arrived at the property, entered the curtilage, and went to the back of the house, where the defendant was, arresting him and collecting evidence. The Fourth Circuit said that if the police had entered the curtilage without having seen the defendant beforehand, they had violated the Fourth Amendment. However, if the officers had seen the defendant from an area outside the curtilage, the knock and talk exception allowed them to approach him. The court then remanded the case for further proceedings. The Covey court reiterated the Fourth Circuit’s pre-Jardines precedent that “[a]n officer may also bypass the front door (or another entry point usually used by visitors) when circumstances reasonably indicate that the officer might find the homeowner elsewhere on the property.”⁵¹ Thus, an

⁴⁵ Id. at 1464.

⁴⁶ See United States v. Taylor, 458 F.3d 1201, 1204 (11th Cir. 2006).

⁴⁷ Id. (quoting United States v. Raines, 243 F.3d 419, 421 (8th Cir. 2001)).

⁴⁸ Walker, 799 F.3d at 1364.

⁴⁹ United States v. Miller, 809 F. App’x 131, 137 (4th Cir. 2020) (internal quotation marks omitted).

⁵⁰ 777 F.3d 186 (4th Cir. 2015).

⁵¹ Id. at 193.

officer can head directly to the backyard of a property without knocking at the front door,⁵² or approach residents standing in a driveway.⁵³

C. Courts where Police Cannot Remain at the Door after No One Has Answered

Before Jardines, the Sixth Circuit had held that officers could take reasonable steps to attempt to speak with an occupant when “circumstances indicate that someone is home” and the officer’s knocking produced no response.⁵⁴ But the Sixth Circuit later overturned this precedent after determining that Jardines forbids this practice.⁵⁵ Instead, officers cannot “linger on the curtilage once they have exhausted the implied invitation extended to all guests, even if they suspect that someone is inside.”⁵⁶

The First Circuit has similarly said that if an occupant has not come to the door, the police cannot persist in attempting additional knock and talks. In French v. Merrill,⁵⁷ officers attempted a knock and talk, received no response, left the house, but returned later that night.⁵⁸ Despite the officers stating that they thought the occupant did not want to talk, they entered the curtilage to knock on the door again.⁵⁹ The First Circuit said that this behavior exceeded the social license necessary for a knock and talk, since “the mere fact that the defendant did not answer the door cannot tip the balance in the officers’ favor.”⁶⁰

⁵² See Alvarez v. Montgomery Cnty., 147 F.3d 354 (4th Cir. 1998) (“[I]n light of the sign reading ‘Party In Back’ with an arrow pointing toward the backyard, it surely was reasonable for the officers to proceed there directly as part of their effort to speak with the party’s host.”).

⁵³ United States v. Miller, 809 F. App’x 131 (4th Cir. 2020).

⁵⁴ See Hardesty v. Hamburg Twp., 461 F.3d 646, 654 (6th Cir. 2006).

⁵⁵ See Brennan v. Dawson, 752 F. App’x 276, 283 (6th Cir. 2018).

⁵⁶ Id. (quoting Morgan v. Fairfield Cnty., Ohio, 903 F.3d 553, 565 (6th Cir. 2018)).

⁵⁷ 15 F.4th 116 (1st Cir. 2021)

⁵⁸ Id. at 128–29.

⁵⁹ Id.

⁶⁰ Id. at 131 (quoting Hopkins v. Bonvicino, 573 F.3d 752, 765 (9th Cir. 2009)).

D. Courts that are Permissive of Officers Remaining on the Curtilage after Receiving No Response

In multiple pre-Jardines case, the Fifth Circuit held that officers must end a knock and talk and pursue different strategies when nobody answers the door.⁶¹ But the Fifth circuit did not limit officers to only knocking at a single door before needing to withdraw, saying that after knocking on the front door and receiving no response, “they might have then knocked on the back door or the door to the back house.”⁶² However, police were not allowed to use the knock and talk exception to peer through a bedroom window on the side of the house after receiving no response at the front door.⁶³ Despite these precedents, the Fifth Circuit has rejected a Jardines challenge to a knock and talk where police continued to knock for several minutes with no response after the officers saw people peering through blinds, although this case was brought by a *pro se* defendant who did not fully raise these issues.⁶⁴

In United States v. Carloss,⁶⁵ the Tenth Circuit examined a knock and talk that lasted for several minutes.⁶⁶ The court declined to set a time limit on how long officers could knock before exceeding the license of a knock and talk.⁶⁷ The court found that the officers did not linger on the curtilage for too long, despite knocking for several minutes, because the officers heard movement inside the house, which “encouraged” them to remain at the door, especially because no one inside the house demanded that the officers leave.⁶⁸

⁶¹ See United States v. Gomez-Moreno, 479 F.3d 350, 356 (5th Cir. 2007); United States v. Troop, 514 F.3d 405, 410 (5th Cir. 2008).

⁶² Gomez-Moreno, 479 F.3d at 356.

⁶³ Troop, 514 F.3d at 411.

⁶⁴ See United States v. Flores, 799 F. App'x 282 (5th Cir. 2020).

⁶⁵ 818 F.3d 988 (10th Cir. 2016).

⁶⁶ Id. at 994.

⁶⁷ Id. at 998.

⁶⁸ Id. at 998.

Applicant Details

First Name	Andrew
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Contact Phone Number	8133993847

Applicant Education

BA/BS From	University of Florida
Date of BA/BS	May 2016
JD/LLB From	Washington and Lee University School of Law
	http://www.law.wlu.edu
Date of JD/LLB	May 12, 2023
Class Rank	15%
Law Review/Journal	Yes
Journal(s)	Washington and Lee Law Review
Moot Court Experience	Yes
Moot Court Name(s)	John W. Davis Moot Court Competition

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	Yes
Post-graduate Judicial Law Clerk	Yes

Specialized Work Experience

Recommenders

Hasbrouck, Brandon
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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June 2, 2023

The Honorable Jamar K. Walker
United States District Court Judge
United States District Court, Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, Virginia 23510

Dear Judge Walker:

I am a recent graduate of Washington and Lee University School of Law and am writing to apply to be your law clerk for the 2024 term. I will be clerking for the Honorable Brynja M. Booth of the Supreme Court of Maryland for the 2023 term. I spent the Spring of 2020 in the Norfolk/Newport News area serving on a COVID-19 emergency response team and I would be delighted to return to the area and experience all that it has to offer now that the critical stages of the pandemic have passed.

As an aspiring litigator, I gained invaluable knowledge of and experience with, the inner workings of a federal trial court as a judicial extern for the Honorable Joel Hoppe of the United States District Court for the Western District of Virginia. There, I refined my practical legal writing skills, emphasizing brevity, clarity, and accuracy. In law school, I served as a Legal Writing Burks Scholar. In this position, I taught first-year students foundational legal writing skills and guided them through their writing assignments throughout the year. Furthermore, I have a strong passion for how the law can advance a more just legal system for all. In that pursuit, I wrote *Mass Arbitration 2.0* for my *Law Review* Note, which considers the profound consequences of mandatory arbitration provisions on consumers and employees across the country. Not only have these experiences prepared me for the deep analysis and detail-oriented research and writing necessary for a clerkship, but they have shaped my thinking of the law. I strongly believe that if I want to understand the law and how it affects people, I need to get proximate to the administration of justice.

Please let me know if I can provide you with any additional information. Thank you for your time and consideration, and I sincerely look forward to hearing from you.

Respectfully,



Andrew Nissensohn

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EDUCATION

WASHINGTON AND LEE UNIVERSITY SCHOOL OF LAW, Lexington, VA
Juris Doctor, *magna cum laude*, May 2023

- GPA: 3.801 (Top 15%)
- Journal: *Washington and Lee Law Review*, Managing Editor
Note: *Mass Arbitration 2.0*, 79 WASH. & LEE L. REV. 1225 (2022)
- Honors: Semifinalist, Best Brief, *John W. Davis Moot Court Competition*
Omicron Delta Kappa, Alpha Chapter
- Activities: Legal Writing Burks Scholar (teaching assistant for first-year legal writing)
Moot Court Executive Board, Mediation Competition Chair
Kirgis Fellow (mentor for first-year students)

UNIVERSITY OF FLORIDA, Gainesville, FL
B.S., *cum laude*, International Food and Resource Economics, May 2020

EXPERIENCE

SUPREME COURT OF MARYLAND, Annapolis, MD
Judicial Law Clerk to The Honorable Brynja M. Booth 2023–2024 Term

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF VIRGINIA, Charlottesville, VA
Judicial Extern to The Honorable Joel Hoppe August 2022–May 2023

- Drafted report and recommendations related to federal jurisdiction, civil remedies, and Social Security Administration appeals
- Wrote bench memoranda with legal analysis and recommendations for a proper disposition of dispositive motions
- Observed judicial hearings and settlement conferences

WASHINGTON AND LEE UNIVERSITY SCHOOL OF LAW, Lexington, VA
Research Assistant for Professor Alan M. Trammell May 2021–May 2023

- Authored memoranda synthesizing mass tort post-settlement fairness principles
- Summarized federal case dockets regarding post-settlement issues in multi-district litigation

CROWELL AND MORING LLP, Washington, D.C.
Summer Associate Summer 2022

- Independently drafted an opposition to a motion to dismiss for a government contracts matter before the Armed Services Board of Contract Appeals
- Researched and drafted memoranda on matters involving government contracts, white-collar crime, products liability, and antitrust law

UNIVERSITY OF HARTFORD, OFFICE OF GENERAL COUNSEL, Hartford, CT
Legal Intern June 2021–August 2021

- Drafted memoranda regarding legal arguments and strategies in Title IX, corporate, and labor and employment matters

INTERESTS

- Voting Rights, Cycling, and *New York Times* Crossword Puzzles

Print Date: 05/15/2023

Page: 1 of 3

Student: Andrew Blake Nissensohn

WASHINGTON AND LEE
UNIVERSITY

Lexington, Virginia 24450-2116



SSN: XXX-XX-1610

Date of Birth: 01/22/XXXX

Entry Date: 08/17/2020

Academic Level: Law

2020-2021 Law Fall

08/17/2020 - 11/24/2020

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 109	CIVIL PROCEDURE	A	4.00	4.00	16.00	
LAW 140	CONTRACTS	A	4.00	4.00	16.00	
LAW 163	LEGAL RESEARCH	A	0.50	0.50	2.00	
LAW 165	LEGAL WRITING I	A-	2.00	2.00	7.34	
LAW 190	TORTS	B+	4.00	4.00	13.32	

Term GPA: 3.769

Totals:

14.50

14.50

54.66

Cumulative GPA: 3.769

Totals:

14.50

14.50

54.66

2020-2021 Law Spring

01/11/2021 - 04/27/2021

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 130	CONSTITUTIONAL LAW	B+	4.00	4.00	13.32	
LAW 150	CRIMINAL LAW	A-	3.00	3.00	11.01	
LAW 163	LEGAL RESEARCH	A	0.50	0.50	2.00	
LAW 166	LEGAL WRITING II	A	2.00	2.00	8.00	
LAW 179	PROPERTY	A-	4.00	4.00	14.68	
LAW 195	TRANSNATIONAL LAW	A-	3.00	3.00	11.01	

Term GPA: 3.637

Totals:

16.50

16.50

60.02

Cumulative GPA: 3.699

Totals:

31.00

31.00

114.68

2021-2022 Law Fall

08/30/2021 - 12/18/2021

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 285	EVIDENCE	A	3.00	3.00	12.00	
LAW 300	FED JURISDICTION & PROCEDURE	A	3.00	3.00	12.00	
LAW 314P	INTL COMPETITION LAW PRACTICUM	A-	3.00	3.00	11.01	
LAW 385P	NEGOTIATION/CONFLICT RES PRAC	A	2.00	2.00	8.00	
LAW 439	FEDERAL WHITE COLLAR CRIME	A	3.00	3.00	12.00	
LAW 511	LAW REVIEW	CR	2.00	2.00	0.00	
LAW 514	INTER-SCHOOL NEGOTIATION COMP	CR	1.00	1.00	0.00	

Term GPA: 3.929

Totals:

17.00

17.00

55.01

Cumulative GPA: 3.770

Totals:

48.00

48.00

169.69

Print Date: 05/15/2023

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Student: Andrew Blake Nissensohn

WASHINGTON AND LEE
UNIVERSITY

Lexington, Virginia 24450-2116

**2021-2022 Law Spring**

01/10/2022 - 04/29/2022

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 216	BUSINESS ASSOCIATIONS	A	4.00	4.00	16.00	
LAW 222	MASS MEDIA LAW	B+	2.00	2.00	6.66	
LAW 267	ELECTRONIC DISCOVERY	P	1.00	1.00	0.00	
LAW 390	PROFESSIONAL RESPONSIBILITY	A	3.00	3.00	12.00	
LAW 428P	TRIAL ADVOCACY PRACTICUM	A-	3.00	3.00	11.01	
LAW 511	LAW REVIEW	CR	2.00	2.00	0.00	

Term GPA: 3.805**Totals:**

15.00

15.00

45.67

Cumulative GPA: 3.778**Totals:**

63.00

63.00

215.36

2022-2023 Law Fall

08/29/2022 - 12/19/2022

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 707B	Skills Immersion: Business	P	2.00	2.00	0.00	
LAW 725	Conflict of Laws	A	3.00	3.00	12.00	
LAW 817	Statutory Interpretation Practicum	A	4.00	4.00	16.00	
LAW 910	Law Review: 3L	CR	1.00	1.00	0.00	
LAW 934	Federal Judicial Externship	A-	2.00	2.00	7.34	
LAW 934FP	Federal Judicial Externship: Field Placement	P	2.00	2.00	0.00	

Term GPA: 3.926**Totals:**

14.00

14.00

35.34

Cumulative GPA: 3.798**Totals:**

77.00

77.00

250.70

2022-2023 Law Spring

01/09/2023 - 04/28/2023

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 705	Remedies	P	3.00	3.00	0.00	
LAW 765	Criminal Procedure: Adjudication	A	3.00	3.00	12.00	
LAW 794	Problems in Corporate Law	A-	1.00	1.00	3.67	
LAW 804	Environmental Litigation Practicum	A	3.00	3.00	12.00	
LAW 910	Law Review: 3L	CR	1.00	1.00	0.00	
LAW 920	Moot Court Board	CR	1.00	1.00	0.00	
LAW 934	Federal Judicial Externship	A-	2.00	2.00	7.34	
LAW 934FP	Federal Judicial Externship: Field Placement	P	2.00	2.00	0.00	

Term GPA: 3.890**Totals:**

16.00

16.00

35.01

Cumulative GPA: 3.809**Totals:**

93.00

93.00

285.71

Print Date: 05/15/2023

Page: 3 of 3

Student: Andrew Blake Nissensohn

Lexington, Virginia 24450-2116

WASHINGTON AND LEE
UNIVERSITY



Law Totals	Credit Att	Credit Earn	Cumulative GPA
Washington & Lee:	93.00	93.00	3.809
External:	0.00	0.00	
Overall:	93.00	93.00	3.809

Degree: J.D. - Juris Doctor

Date Conferred: 05/12/2023

Honor: magna cum laude

Program: Law

End of Official Transcript



WASHINGTON AND LEE UNIVERSITY TRANSCRIPT KEY

Founded in 1749 as Augusta Academy, the University has been named, successively, Liberty Hall (1776), Liberty Hall Academy (1782), Washington Academy (1796), Washington College (1813), and The Washington and Lee University (1871). W&L has enjoyed continual accreditation by or membership in the following since the indicated year: The Commission on Colleges of the Southern Association of Colleges and Schools (1895); the Association of American Law Schools (1920); the American Bar Association Council on Legal Education (1923); the Association to Advance Collegiate Schools of Business (1927); the American Chemical Society (1941); the Accrediting Council for Education in Journalism and Mass Communications (1948), and Teacher Education Accreditation Council (2012).

The **basic unit of credit** for the College, the Williams School of Commerce, Economics and Politics, and the School of Law is equivalent to a semester hour.

The **undergraduate calendar** consists of three terms. From 1970-2009: 12 weeks, 12 weeks, and 6 weeks of instructional time, plus exams, from September to June. From 2009 to present: 12 weeks, 12 weeks, and 4 weeks, September to May.

The **law school calendar** consists of two 14-week semesters beginning in August and ending in May.

Official transcripts, printed on blue and white safety paper and bearing the University seal and the University Registrar's signature, are sent directly to individuals, schools or organizations upon the written request of the student or alumnus/a. Those issued directly to the individual involved are stamped "Issued to Student" in red ink. ***In accordance with The Family Educational Rights and Privacy Act of 1974, as amended, the information in this transcript is released on the condition that you permit no third-party access to it without the written consent from the individual whose record it is. If you cannot comply, please return this record.***

Undergraduate

Degrees awarded: Bachelor of Arts in the College (BA); Bachelor of Arts in the Williams School of Commerce, Economics and Politics (BAC); Bachelor of Science (BS); Bachelor of Science with Special Attainments in Commerce (BSC); and Bachelor of Science with Special Attainments in Chemistry (BCH).

Grade	Points	Description
A+	4.00	} Superior.
A	4.00	
A-	3.67	
B+	3.33	} Good.
B	3.00	
B-	2.67	
C+	2.33	} Fair.
C	2.00	
C-	1.67	
D+	1.33	} Marginal.
D	1.00	
D-	0.67	
E	0.00	Conditional failure. Assigned when the student's class average is passing and the final examination grade is F. Equivalent to F in all calculations
F	0.00	Unconditional failure.

Grades not used in calculations:

I	-	Incomplete. Work of the course not completed or final examination deferred for causes beyond the reasonable control of the student.
P	-	Pass. Completion of course taken Pass/Fail with grade of D- or higher.
S, U	-	Satisfactory/Unsatisfactory.
WIP	-	Work-in-Progress.
W, WP, WF	-	Withdrew, Withdrew Passing, Withdrew Failing. Indicate the student's work up to the time the course was dropped or the student withdrew.

Grade prefixes:

R	Indicates an undergraduate course subsequently repeated at W&L (e.g. RC-).
E	Indicates removal of conditional failure (e.g. ED = D). The grade is used in term and cumulative calculations as defined above.

Ungraded credit:

Advanced Placement: includes Advanced Placement Program, International Baccalaureate and departmental advanced standing credits.

Transfer Credit: credit taken elsewhere while not a W&L student or during approved study off campus.

Cumulative Adjustments:

Partial degree credit: Through 2003, students with two or more entrance units in a language received reduced degree credit when enrolled in elementary sequences of that language.

Dean's List: Full-time students with a fall or winter term GPA of at least 3.400 and a cumulative GPA of at least 2.000 and no individual grade below C (2.0). Prior to Fall 1995, the term GPA standard was 3.000.

Honor Roll: Full-time students with a fall or winter term GPA of 3.750. Prior to Fall 1995, the term GPA standard was 3.500.

University Scholars: This special academic program (1985-2012) consisted of one required special seminar each in the humanities, natural sciences and social sciences; and a thesis. All courses and thesis work contributed fully to degree requirements.

Law

Degrees awarded: Juris Doctor (JD) and Master of Laws (LLM)

Numerical	Letter	Grade*	Grade**	Points	Description
4.0	A			4.00	
	A-			3.67	
3.5				3.50	
	B+			3.33	
3.0	B			3.00	
	B-			2.67	
2.5				2.50	
	C+			2.33	
2.0	C			2.00	
	C-			1.67	
1.5				1.50	This grade eliminated after Class of 1990.
	D+			1.33	
1.0	D			1.00	A grade of D or higher in each required course is necessary for graduation.
	D-			0.67	Receipt of D- or F in a required course mandates repeating the course.
0.5				0.50	This grade eliminated after the Class of 1990.
0.0	F			0.00	Receipt of D- or F in a required course mandates repeating the course.

Grades not used in calculations:

-	WIP	-	Work-in-progress. Two-semester course.
I	I	-	Incomplete.
CR	CR	-	Credit-only activity.
P	P	-	Pass. Completion of graded course taken Pass/Not Passing with grade of 2.0 or C or higher. Completion of Pass/Not Passing course or Honors/Pass/Not Passing course with passing grade.
-	H	-	Honors. Top 20% in Honors/Pass/Not Passing courses.
F	-	-	Fail. Given for grade below 2.0 in graded course taken Pass/Fail.
-	NP	-	Not Passing. Given for grade below C in graded course taken Pass/Not Passing. Given for non-passing grade in Pass/Not Passing course or Honors/Pass/Not Passing course.

* Numerical grades given in all courses until Spring 1997 and given in upperclass courses for the Classes of 1998 and 1999 during the 1997-98 academic year.

** Letter grades given to the Class of 2000 beginning Fall 1997 and for all courses beginning Fall 1998.

Cumulative Adjustments:

Law transfer credits - Student's grade-point average is adjusted to reflect prior work at another institution after completing the first year of study at W&L.

Course Numbering Update: Effective Fall 2022, the Law course numbering scheme went from 100-400 level to 500-800 level.

Office of the University Registrar
Washington and Lee University
Lexington, Virginia 24450-2116
phone: 540.458.8455
email: registrar@wlu.edu


University Registrar

An official transcript has heat-sensitive ink on the reverse side.



UNIVERSITY OF FLORIDA

Official Academic Transcript

Office of the University Registrar
222 Criser Hall, Box 114000
Gainesville, FL 32611-4000

www.ufl.edu
www.registrar.ufl.edu
352-392-1374

Do Not Release to Third Party Without Student Permission

Name: Andrew B Nissensohn
Social Security Number: XXX-XX-1610
UFID: 7667-9122

Date of Birth: January 22
Basis of Admission: Beginning Freshman
Residency Status: Florida Resident/Tuition (F)

Andrew Blake Nissensohn
550 Borden Road
B10
Lexington, VA 24450

This transcript is not valid without the university seal
and signature of the University Registrar

Stephen J. Fritz Jr.
University Registrar



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Prefix & Course Number	Course Title	Course Notation	Grade	Credit Attempted	Earned Hours	Hours Carried
------------------------	--------------	-----------------	-------	------------------	--------------	---------------

Begin Undergraduate and/or Certificate Transcript

Programs Pursued

College: The College of Agricultural and Life Sciences
Degree Sought: Bachelor of Science
Major: Food and Resource Economics
Emphasis: International Food and Resource Economics
Minor: International Development and Humanitarian Assistance
Minor: Public Leadership

Fall 2016
Total Hours Received: 12.00

Transfer Credit from Hillsborough Cmty College

Fall 2016
Credit by Exam

Advanced Placement

ECO 2013 Prin Macroeconomics
ECO 2023 Prin Microeconomics
GEO 2420 Intro Human Geography
ISC T000 Transfer ISC Course
STA 2023 Intro to Statistics 1

Grade Points: 0.00

Earned Hours: 17.00

Hours Carried: 0.00

Fall 2016

University of Florida
The Warrington College of Business
The Heavener School of Business

Undergraduate

Enrolled Coursework

CPO 2001 Comparative Politics
GEB 2015 Intro to Business
ISM 3013 Intro to Info Systems
MAC 2233 Survey of Calculus 1
THE 2000 Theatre Apprec 1

Grade Points: 50.00

Earned Hours: 14.00

Hours Carried: 14.00

Spring 2017

University of Florida
The Warrington College of Business
The Heavener School of Business

Undergraduate

Enrolled Coursework

ACG 2021 Intro Finan Accounting
BUL 4310 Legal Environ Busines
IUF 1000 What Is the Good Life
MAN 3025 Prins of Management

Grade Points: 33.99

Earned Hours: 11.00

Hours Carried: 11.00

Summer 2017

Transfer Credit from Hillsborough Cmty College

Undergraduate: Page 1 of 4

Date Printed: January 15, 2021

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[Signature]

Stephen J. Fritz Jr.
University Registrar



Prefix & Course Number	Course Title	Course Notation	Grade	Credit Attempted	Earned Hours	Hours Carried
Total Hours Received: 6.00						
Fall 2017						
University of Florida						
The College of Agricultural and Life Sciences						
Enrolled Coursework						
AEB 2451	Econ of Resource Use		A	3.00	3.00	3.00
AEB 3103	Principles of Fre		A	4.00	4.00	4.00
AEB 3133	Prin Agribus Manage		A-	3.00	3.00	3.00
AEB 3510	Quant Meth Food & Res		A	3.00	3.00	3.00
AEB 3935	Food & Res Econ Sem		A	1.00	1.00	1.00
Grade Points: 55.01				Earned Hours: 14.00		Hours Carried: 14.00
Summer 2018						
University of Florida						
The College of Agricultural and Life Sciences						
Enrolled Coursework						
Session: May-June 6 Weeks						
GEA 3600	Geography of Africa		A	3.00	3.00	3.00
Session: May-August 12 Weeks						
BSC 2005	Biological Sciences		A-	3.00	3.00	3.00
BSC 2005L	Lab in Biol Sciences		A	1.00	1.00	1.00
Session: July-August 6 Weeks						
URP 3001	Cities of the World		A	3.00	3.00	3.00
Grade Points: 39.01				Earned Hours: 10.00		Hours Carried: 10.00
Fall 2018						
University of Florida						
The College of Agricultural and Life Sciences						
Enrolled Coursework						
AEB 3144	Intr to Agric Finance		A	3.00	3.00	3.00
AEB 3281	Ag Macroeconomics		A	3.00	3.00	3.00
AEB 3550	Agric Data Analysis		A	3.00	3.00	3.00
AEB 4283	Internat Devel Policy		A	3.00	3.00	3.00
SPC 2608	Intro Public Speaking		A	3.00	3.00	3.00
Named to President's Honor Roll						
Grade Points: 60.00				Earned Hours: 15.00		Hours Carried: 15.00
Spring 2019						
University of Florida						
The College of Agricultural and Life Sciences						
Enrolled Coursework						
AEB 4282	Intl Humanitar Assist		A-	3.00	3.00	3.00
ECO 3101	Intermed Microecon		A	4.00	4.00	4.00
ECO 3704	International Trade		A	4.00	4.00	4.00
ENC 3254	Prof Writ Disciplines		A	3.00	3.00	3.00
EUS 3220	Secrt Police Communsm		A	3.00	3.00	3.00

Undergraduate: Page 2 of 4

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Basis of Admission: Beginning Freshman

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Stephen J. Fritz Jr.
University Registrar



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Prefix & Course Number	Course Title	Course Notation	Grade	Credit Attempted	Earned Hours	Hours Carried
------------------------	--------------	-----------------	-------	------------------	--------------	---------------

Grade Points: 67.01 Earned Hours: 17.00 Hours Carried: 17.00

Summer 2019

University of Florida

Undergraduate

Enrolled Coursework

The College of Agricultural and Life Sciences

CHM 1020	Chem for Liberal Arts		A	3.00	3.00	3.00
IDS 4940	Internship		S	1.00	1.00	0.00
POS 2041	American Federal Govt		B+	3.00	3.00	3.00
WIS 2552	Biodivers Cons Global		A	3.00	3.00	3.00

Grade Points: 33.99 Earned Hours: 10.00 Hours Carried: 9.00

Fall 2019

University of Florida

Undergraduate

Enrolled Coursework

The College of Agricultural and Life Sciences

AEB 3300	Agric/Food Marketing		A	3.00	3.00	3.00
AEB 3671	Compar World Agric		A-	3.00	3.00	3.00
ECO 4421	Econometrics		B+	4.00	4.00	4.00
POS 3606	Amer Civil Liberties		A-	3.00	3.00	3.00
POS 4424	Legislative Politics		A	3.00	3.00	3.00

Grade Points: 59.34 Earned Hours: 16.00 Hours Carried: 16.00

Spring 2020

University of Florida

Undergraduate

COVID-19 Pandemic: Students given the option of letter grading, S-U grading, or drop.

Enrolled Coursework

AEB 4242	Internat Trade Policy		A	3.00	3.00	3.00
AEB 4343	Internat Agri Market		A	3.00	3.00	3.00
AMH 3423	Florida Since 1845		A	3.00	3.00	3.00
POS 3263	Poly/Ethcs/Pub Ldrshp		A	3.00	3.00	3.00
POS 4931	Israelis/Palestinians		S	3.00	3.00	0.00

Named to President's Honor Roll

Grade Points: 48.00 Earned Hours: 15.00 Hours Carried: 12.00

Degrees Awarded

Awarded Bachelor of Science

Graduated May 5, 2020

Cum Laude

Major Food and Resource Economics

Emphasis International Food and Resource Economics

Minor International Development and Humanitarian Assistance

Minor Public Leadership

Undergraduate: Page 3 of 4

Date Printed: January 15, 2021

Copies Requested: 1

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[Signature]

Stephen J. Fritz Jr.
University Registrar



Cumulative GPA: 3.78 Grade Points: 446.35 Earned Hours: 157.00 Hours Carried: 118.00

UF CUM Grade Points: 446.35
UF Earned Hours: 139.00

UF CUM Hours Carried: 118.00
Transfer Hours: 18.00

End of Official Transcript

5520

WASHINGTON AND LEE UNIVERSITY
SCHOOL OF LAW
LEXINGTON, VA 24450

June 05, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I most enthusiastically recommend Andrew Nissensohn for a judicial clerkship. Andrew was not only an amazing student—one of the most talented and gifted advocates that I have had the pleasure to teach or work with—but a great person. Andrew is a truly impressive young professional and will be a terrific law clerk.

As background, I had Andrew as a student in my criminal law class. Andrew, quite frankly, dominated—he received the second highest score in my class on a very difficult exam (I had 40 students). And, it was not even close. Out of the possibility of 105 raw points for my exam, Andrew received 94 points—the class average was around 73 points. Andrew received the second highest grade in my course. Simply put, Andrew was a standout.

The fluency in criminal law theory and concepts with which Andrew achieved suggests an extraordinary talent. Of equal importance to the grade he earned, I found Andrew to be genuinely animated by the intellectual endeavor that is the study of the law. He was always prepared for class. And his curiosity and enthusiasm led him to ask tough and insightful questions or offer comments that sparked critical inquisitiveness in his classmates and helped me explore or better explain issues. Andrew also struck me as a natural leader, raising many issues concerning racial disparities in our criminal legal system—an issue that first-year law students often avoid. Andrew acutely pointed out that regimes, from policing through sentencing, are a criminal justice domain in which inequalities abound—and in ways that raise profound questions about fairness, due process, and justice. Andrew lived in my office during office hours—he would always want to continue our class conversations, discuss pressing legal issues, or discuss the legal profession. I found him to be intentional and thoughtful about everything. Andrew also appreciates that to truly understand issues, you must get proximate to the administration of justice—that is his motivation to serve as a law clerk. I should note that I was so impressed with Andrew that I asked him to be my research assistant; unfortunately, because he was the most sought after law student by all of my colleagues (one look at his incredible academic record—he is closing in on a 3.8 overall GPA—especially explains why), he already agreed to be my colleague's research assistant.

Andrew was also an incredible citizen of our law school. He was a junior editor on the Washington and Lee Law Review—a widely respected journal in which an invitation to join only follows after a competitive write-on process. I am the faculty advisor to the Law Review. In that capacity, senior editors reported to me that Andrew has brilliantly performed in a wide range of demanding editorial duties. Further, Andrew is responsible for writing a law journal note on a novel topic of legal interest. Andrew, never afraid of a challenge, wrote his paper on the intersection of mass arbitration and class waivers. Specifically, after the Supreme Court's decision in *AT&T Mobility v. Concepcion*, corporations have been able to utilize class-waivers in mandatory arbitration agreements to prevent class treatment in arbitration. Highly funded plaintiffs' firms have capitalized on the waivers by bringing thousands of demands for individual arbitration. The "consumer friendly" provisions in the arbitration agreements require the corporations to pay all filing fees, so they are hit with \$10 million bills from the American Arbitration Association. Andrew is exploring responses and frameworks to these many challenges. I have had the privilege to read this note, it is dynamite; a tour-de-force.

As a former law clerk to two judges—the Honorable Roger L. Gregory (4th Cir.) and the Honorable Emmet G. Sullivan (DDC)—I, more than most, understand what is expected of a law clerk: trustworthiness, dependability, and excellence. That is Andrew. Andrew exudes trustworthiness and reliability—he is a real self-starter with an intuitive grasp for what needs to be done and how. Andrew is also a person of integrity, perspective, and balance. Reflective and poised, he is always thinking of how to improve, but he also has mettle, confidence, and great tenacity to tackle difficult and thorny legal questions. Andrew thrives in interpersonal relations, and would mix respectfully with other law clerks and staff. I would trust him with any work product, no matter how sensitive, and have the utmost confidence that he would always conduct himself with dignity and discretion. More importantly, in my opinion, Andrew's compassion and passion separates him from most—he will work tirelessly to ensure that your bench memorandums are well researched and recommend the right result for the right reasons. That is excellence—excellence that he demonstrated throughout his career at Washington and Lee University School of Law.

In sum, I offer Andrew my most enthusiastic and unreserved recommendation. He will be an amazing law clerk. It is my sincere hope that he has the opportunity and privilege to work for you.

Please feel free to reach out to me at hasbrouck@wlu.edu or 914-443-1324 should you have any questions, Judge.

Respectfully,

Brandon Hasbrouck

Brandon Hasbrouck - hasbrouck@wlu.edu

Assistant Professor of Law

Brandon Hasbrouck - bhasbrouck@wlu.edu

WASHINGTON AND LEE UNIVERSITY
SCHOOL OF LAW
LEXINGTON, VA 24450

June 05, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I enthusiastically recommend Andrew Nissensohn as a judicial clerk for your chambers. Andrew was my student in Professional Responsibility during his 2L year and he served this past year as my Burks Scholar, which is a teaching assistant for the first year Legal Writing program.

As Andrew's record reflects, he excelled in his law school classes, was an integral part of the Law Review, managed our in-house Mediation competition as a part of Moot Court, and served as a Burks Scholar. His work as a Burks Scholar was both challenging and demanding; not surprisingly Andrew rose to the challenge. His work was always timely, he was always prepared, and he took direction and critique well. The students he worked with respected and trusted him.

With respect to his service as a Burks Scholar, in addition to attending class with the 1Ls, giving Bluebook lectures, and meeting one-on-one with students to assist them in developing their writing, Andrew took the lead on preparing our open research memorandum problem in the fall semester. This is not a normal part of the job, but Andrew had worked on a government contracts issue over the summer that he was excited to use as a problem. This meant he had to learn how to break down an issue for first year students, develop the record, and then draft the background legal memorandum. He did an exceptional job, and the problem was a great success.

This experience, as well as the experience of working with students whose writing skills were not as polished as his own, really helped Andrew grow as a person and as a legal writer. Having to break down skills and teach them to someone else improves your own writing. Exposure to other approaches to legal questions strengthens your own analytical skills and forces you to consider other perspectives. Andrew embraced both. He poured so much into this position, and he got just as much out of it. He did all of this while managing his other responsibilities to Law Review, Moot Court, and his externship.

Given Andrew's excellent writing and analytical skills, his work ethic, and his collegial personality, I am confident he would make an outstanding judicial clerk. Please do not hesitate to contact me with any questions.

Sincerely,

Heather M. Kolinsky
Professor of Practice

Heather Kolinsky - hkolinsky@wlu.edu

WASHINGTON AND LEE UNIVERSITY
SCHOOL OF LAW
LEXINGTON, VA 24450

June 05, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I understand that Andrew Nissensohn has applied for a clerkship in your chambers. He has taken two courses with me—Civil Procedure in the fall of 2020 and Federal Jurisdiction and Procedure in the fall of 2021—and has served as my research assistant since the summer of 2021. Across all of these contexts, Andrew has been a star. I regard him as one of the most exceptional students whom I have encountered during my eleven years of teaching, and I write to offer him my most enthusiastic recommendation.

I came to appreciate Andrew's intellect, curiosity, and engagement quite early during his first semester of law school. He demonstrated a unique capacity to home in on the most difficult questions, and he never shirked from them. In class, he stood out not only because of his intellectual acumen but also because of the comradery that he fostered with his classmates and the sheer joy with which he approached Civil Procedure. I was not surprised when he wrote one of the very best exams in the class, distinguishing himself from even other "A" exams through careful analysis and a succinct writing style.

In Federal Jurisdiction and Procedure, Andrew continued to evince those same qualities. The course has a justified reputation for being among the most challenging in the law school curriculum, and it tends to attract bright and engaged students. Even by these estimable standards, the group whom I had the privilege to teach and learn from last fall ranked among the best of my career. Andrew's incisive contributions played an essential role. This particular class did not simply meet the challenges, from engaging with notoriously difficult doctrines to carefully working through problem sets, but they always seemed eager to push the conversation to the next level. We situated various doctrines, including Section 1983 and qualified immunity, within contemporary debates about policing and racial justice. And we applied an array of doctrines—including justiciability, pre-enforcement review, and the deep theory of *Ex parte Young*—to the thorny questions raised by S.B. 8, the novel Texas statute that created a private right of action against individuals who perform or facilitate abortions. At several points during the semester, a handful of students, including Andrew, truly kept me on my toes. For example, one morning they came to class and peppered me with questions about the previous day's oral arguments in front of the Supreme Court before I had had a chance to read the transcript. Suffice it to say that having students like Andrew in class is a law professor's dream. Yet again, he wrote one of the top exams in the class, easily earning an A.

For all that Andrew has impressed me in class, my enthusiasm for his tremendous talents stems most from his work as my research assistant. I was delighted when he expressed an interest in conducting research for me last summer. Normally my summer work involves doctrinal research (using familiar tools like Westlaw) and basic editing. This past summer, though, proved quite different. My current project explores a range of vexing issues that can arise after the parties have reached a settlement, usually in complex litigation. As my co-author on this project likes to say: contrary to popular belief, settlement is rarely the end of the story; it is often just the beginning. Throughout the summer, Andrew served as my eyes and ears, creatively and doggedly sifting through voluminous dockets on Bloomberg, tracking down transcripts of recent hearings that do not yet appear on any search engines, and the like. Along the way, he has taught me as least as much about good legal research methods as I have taught him. Andrew has become an essential member of a team of librarians and research assistants here at W&L and at Georgetown, where my co-author teaches. His research and clear thinking have proved vital as we address the myriad and challenging issues that this project presents.

Beyond Andrew's considerable research and writing talents, working with him is a genuine joy. At every turn, he approaches his assignments with enthusiasm and a collaborative spirit. He has a refreshing sense of humor and never takes himself too seriously. In short, Andrew is exactly the kind of person who will thrive as a clerk and on whom you can rely implicitly.

I cannot recommend Andrew to you more highly, and I hope that you will not hesitate to contact me if I can provide any other information that you would find helpful.

Sincerely,

Alan M. Trammell
Associate Professor of Law

Alan Trammell - atrammell@wlu.edu

ANDREW B. NISSENSOHN

550 Borden Road, Apt. B10
Lexington, VA 24450

nissensohn.a23@law.wlu.edu
(813) 399-3847

4610 Mirabella Place
Lutz, FL 33558

Writing Sample

The attached writing sample is a Memorandum of Law in Opposition to a Motion for a Preliminary Injunction that I was assigned for my Environmental Litigation Practicum. The Memorandum only addresses the irreparable harm prong of the *Winter* preliminary injunction test. All students in the course were assigned to represent the defendant-landowners. Pursuant to the assignment's instructions, I cite to three evidentiary hearing transcripts to support factual assertions. The transcripts were assumed to represent one complete deposition transcript.

I performed all research independently and all the writing is entirely my own.

**DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S
MOTION FOR PRELIMINARY INJUNCTION ALLOWING IMMEDIATE
POSSESSION**

Defendants, Sizemore, Inc. and New River Conservancy, file this Memorandum in Opposition to Plaintiff Mountain Valley Pipeline's ("MVP") Motion for Preliminary Injunction Allowing Immediate Possession. MVP's Motion for Preliminary Injunction should be denied because, among other reasons, MVP fails to make a clear showing that it will suffer irreparable harm absent preliminary relief.

ARGUMENT

I. MVP's Motion for a Preliminary Injunction Should Be Denied Because The Company Cannot Demonstrate That It Will Suffer Irreparable Harm.

MVP is unable to demonstrate that it will suffer irreparable harm absent preliminary relief from this court. A preliminary injunction "is an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). "Granting a preliminary injunction requires that a district court, acting on an incomplete record, order a party to act, or refrain from acting, in a certain way." *Hughes Network Sys., Inc. v. InterDigital Comm'ns Corp.*, 17 F.3d 691, 693 (4th Cir. 1994). MVP has moved this Court for a *mandatory* preliminary injunction—relief that, in "any circumstance is disfavored, and warranted only in the most extraordinary circumstances." *In re Microsoft Corp. Antitrust Litig.*, 333 F.2d 517, 525 (4th Cir. 2003) (citing *Taylor v. Freeman*, 34 F.3d 266, 270 n.2 (4th Cir. 1994)). Although the traditional purpose of a prohibitory preliminary injunction is "to protect the status quo and to prevent irreparable harm during the pendency of a lawsuit," a mandatory preliminary injunction does not preserve the status quo and "normally should be granted only in those circumstances when the exigencies of the situation demand such relief." *Id.* at 526 (citing *Wetzel v. Edwards*, 635 F.2d 283, 286 (4th Cir. 1980)). Because a preliminary injunction temporarily affords relief that can be

granted after trial, the movant must demonstrate by “a clear showing” that it (1) is likely to succeed on the merits, (2) is likely to suffer irreparable harm in the absence of a preliminary injunction, (3) that the balance of equities tips in its favor, and (4) that an injunction is in the public interest. *See Real Truth About Obama, Inc., v. Fed. Election Comm’n*, 575 F.3d 342, 346 (4th Cir. 2009) (citing *Winter*, 555 U.S. at 21). MVP has failed to make a clear showing that it will suffer irreparable harm absent a preliminary injunction.

A. MVP’s Claimed Economic Loss That It Will Suffer From a Delay in Construction Does Not Constitute Irreparable Harm.

MVP alleges that it will suffer irreparable harm if it is unable to begin clearing and construction activities by February 1, 2018, as it will be unable to complete the pipeline project under its self-selected construction schedule. Pl.’s Mem. in Supp. of Mot. Partial Summ. J. & Immediate Possession 14, Oct. 27, 2017, ECF No. 6. Importantly, for alleged harm to be irreparable, it must be “neither remote nor speculative, but actual and imminent.” *Direx Isr. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1991) (quoting *Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969, 975 (2d Cir. 1989)). Anticipated economic losses are insufficient to establish irreparable harm. *See Sampson v. Murray*, 415 U.S. 61, 90, 94 (1974) (“Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of [an injunction] are not enough.”).

As a preliminary matter, MVP asserts that it “must comply with administrative agency regulations of the United States Fish and Wildlife Service [(“FWS”)] requiring that certain tree clearing be complete by March 31, 2018, and that construction of roads is complete by March 31, 2018.” Cooper Decl. ¶ 25. If MVP fails to do so, it claims that it “may be subject to fines and will incur damages,” *id.*, and such a delay would give rise to the other alleged categories of economic harm discussed below. Critically, FWS has not issued MVP a permit that would allow

it to conduct tree-clearing projects only before March 2018, nor do the regulations require such a permit. As Robert Cooper, the Senior Vice President of Engineering at MVP, acknowledged during his testimony at the evidentiary hearing, FWS requires only that the tree clearing occur between November 15 and March 31 of each calendar year. S.D. W. Va. Tr. 168:19–24. MVP could begin tree clearing on November 15, 2018, without breaching the terms of any FWS permit or regulation, and therefore, will not suffer irreparable harm relating to FWS regulations.

MVP next claims it will suffer three categories of irreparable economic harm if the Court does not grant its Motion for Preliminary Injunction and it is forced to delay construction of the pipeline: (i) \$600 million in lost revenues, (ii) \$200 million in cancellation penalties relating to construction contracts, and (iii) \$40 to \$45 million in incremental administrative costs. S.D. W. Va. Tr. 64:22–25. In total, MVP alleges that it will suffer nearly \$850 million in irreparable harm for a mere one-year delay. S.D. W. Va. 65:1. While there are limited exceptions to the general rule that economic losses cannot constitute irreparable harm, those exceptions do not apply to MVP’s claimed economic harm. *See, e.g., United States ex rel. Taxpayers Against Fraud v. Singer Co.*, 889 F.2d 1327, 1330 n.15 (4th Cir. 1989) (“A court has the power to issue a preliminary injunction to prevent a *defendant from dissipating assets* in order to *preserve* the possibility of equitable remedies.” (emphasis added)).

The \$600 million in “lost” revenues that MVP claims it will suffer due to a one-year delay in the construction of the pipeline stem from Precedent Agreements that it entered with natural gas shippers. *See generally, e.g., J.A.* 2888–2917. *See also* S.D. W. Va. 50:9–15. (“The revenue associated with this project is roughly \$40 to \$50 million a month.”). MVP, however, fails to recognize that the supposed “lost” revenues are merely *delayed* revenues and thus do not constitute irreparable harm. MVP negotiated the Precedent Agreements as a part of an “open

season” it initiated before receiving its FERC Certificate, W.D. Va. Tr. 256:21–24, to demonstrate a general interest in the pipeline’s services. W.D. Va. Tr. 168:8–11. The Precedent Agreements are between MVP and multiple shippers of natural gas who have committed to use the pipeline. W.D. Va. Tr. 258:4–10. All the “shippers” that MVP contracted with have an affiliate relationship with MVP or with its members. W.D. Va. Tr. 168:8–12. Facially, there is not a third party “from whom shipping revenues will be received by MVP that’s not in that affiliate relationship.” W.D. Va. Tr. 169:1-2. Therefore, *even if* MVP will lose revenues because of a delay, it is merely a financial shift between affiliated companies, and therefore not actual harm.

Specific provisions of the Precedent Agreements negate MVP’s claim that it will suffer economic harm, let alone irreparable harm, if it were to breach them. MVP will not lose *any* expected revenues if this Court were to enter a preliminary injunction delaying the construction of the pipeline. S.D. W. Va. Tr. 75:2–14. While Cooper alleged in his declaration in support of MVP’s motion that MVP has “agreements in place to begin shipping gas in 2018,” Cooper Decl. ¶ 26, he conceded in his deposition that 2018 is the earliest possible time that MVP could *possibly* begin to ship gas, not the time that it *must* begin to do so. S.D. W. Va. Tr. 78. The Precedent Agreements provide for a twenty-year term that begins on the “Service Commencement Date,” which

shall be the *later* of (i) November 1, 2018 or (ii) the first day of the month immediately following the date on which [MVP] is authorized by FERC to commence service on the project facilities and Transporter is first able, in its reasonable judgment, to render service to shipping utilizing the Project Capacity.

J.A. 2892 (emphasis added). Thus, if the project is delayed one year, MVP would still receive twenty years of revenue, just one year later. S.D. W. Va. Tr. 78:10–12. Furthermore, MVP has

not provided any estimate of the time value of the delayed revenue as evidence of irreparable harm. S.D. W. Va. Tr. 77:23–25, 78:1–5.

The conditions precedent in the Precedent Agreements undermine the conclusion that they will cause economic harm if this Court does not grant MVP’s preliminary injunction motion. The Precedent Agreements provide that MVP’s contractual obligations are subject to its “receipt, by May 1, 2018, of all *permits*, licenses, authorizations, *right-of-way*, [or] regulatory consents necessary for the construction and operation of the Project.” J.A. 2895–96 (emphasis added). Even if MVP obtains all rights-of-way at issue in the present litigation, it has failed to secure a Section 401 Water Quality Certification from the Commonwealth of Virginia for either its FERC Certificate or its Section 404 permit. It is unclear and speculative as to whether MVP will even receive this required certification. *See* 33 U.S.C. § 1341 (prohibiting a federal agency from issuing a permit or license to conduct any activity that may result in any discharge into waters of the United States unless a Section 401 permit is issued, or certification is waived). “Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur.” *Wis. Gas Co. v. Fed. Energy Regul. Comm’n*, 758 F.2d 669, 674 (D.C. Cir. 1985) (emphasis in original).

Further undermining MVP’s assertion that it would suffer irreparable harm from a “breach” of the Precedent Agreements, the Precedent Agreements provide that so long as the pipeline is placed in service by June 1, 2020, the shippers remain bound to their obligations under it. J.A. 2895; *see also* S.D. W. Va. Tr. 79:13–19. The Precedent Agreements provides that if a shipper were to terminate the Agreement because the pipeline is not placed in service by that date, the shipper would pay MVP the shipper’s “pro rata share of expenses actually incurred and other obligations made to that point by [MVP] for development of the completed Project, plus

[fifteen percent].” J.A. 2899. In other words, if MVP were to place the pipeline in service by June 1, 2020, and the shipper were to terminate the agreement, the shipper must pay MVP for all its sunk costs. Therefore, MVP has failed to clearly establish that the Precedent Agreements would cause it to suffer irreparable harm absent an injunction.

The second economic harm that MVP claims it will suffer is \$200 million in penalties and delay charges from Construction Master Service Agreements (“MSA”) and purchase orders to which it is party. *See, e.g.*, J.A. 3127–33; W.D. Va. Tr. 191:9–14. MVP arrives at \$200 million, the “maximum” harm it would sustain from these contracts, W.D. Va. Tr. 191:15, by aggregating the penalty structures outlined in each of the purchase orders. W.D. Va. Tr. 132:23–25, 133:1–2. While ordinarily “economic loss does not, in and of itself, constitute irreparable harm,” *Wis. Gas Co.*, 758 F.2d at 674, “this general rule rests on the assumption that economic losses are recoverable.” *Columbia Gas Transmission, LLC v. 84.53 Acres of Land*, 810 F. Supp. 3d 685, 692 (N.D.W.V. 2018) (quoting *N.C. Growers’ Ass’n v. Solis*, 644 F. Supp. 2d 664, 671 (M.D.N.C. 2009)). While the Fourth Circuit has explored the concept that irreparable economic harm has an “existential” element, *see Hughes Network Sys., Inc.*, 17 F.3d at 694 (holding that “extraordinary circumstances may give rise to the irreparable harm required for a preliminary injunction”), it has yet to articulate how courts should square this in situations where economic harm is not recoverable. Other courts, specifically in the D.C. Circuit, however, have addressed those extraordinary circumstances.

Even if MVP were to suffer some amount of unrecoverable economic harm, “recoverability is but one factor the court must consider in assessing alleged irreparable harm in the form of economic losses.” *Nat’l Mining Ass’n v. Jackson*, 768 F. Supp. 2d 34, 53 (D.D.C. 2011). Although any “losses” potentially sustained here are unrecoverable because MVP does

not have a cognizable cause of action against Landowners to recover them, a per se rule under which there is irreparable harm if economic losses are unrecoverable would “effectively eliminate the irreparable harm standard.” *Air Transport Ass’n of Am., Inc. v. Export-Import Bank of the U.S.*, 840 F. Supp. 2d 327, 335 (D.D.C. 2012) (“Any movant that could show any damages against an agency with sovereign immunity—even as little as \$1—would satisfy the standard.” (emphasis added)). Even when unrecoverable, “[t]he wiser formula requires that the economic harm be *significant*.” *Id.*; see also *Save Jobs USA v. U.S. Dep’t of Homeland Sec.*, 105 F. Supp. 3d 108, 115 (D.D.C. May 14, 2015) (“[U]nrecoverable economic losses do not automatically constitute irreparable harm, but instead must be *sufficiently severe* to warrant emergency relief.” (emphasis added)). Therefore, the mere fact that MVP may incur unrecoverable economic losses “does not, in and of itself, compel a finding of irreparable harm.” *Nat’l Mining Ass’n*, 768 F. Supp. 2d at 53. MVP has not made “a strong showing that the economic loss would significantly damage its business above and beyond a simple diminution in profits,” *Air Transport Ass’n of Am.*, 840 F. Supp. 2d at 336 (citing *Mylan Pharms., Inc. v. Shalala*, 81 F. Supp. 2d 30, 43 (D.D.C. 2000)), or demonstrated “that the loss would ‘cause extreme hardship to [it], or even threaten destruction of the business,’” *id.* (citing *Gulf Oil Corp. v. Dep’t of Energy*, 514 F. Supp. 1019, 1026 (D.D.C. 1981)), sufficient to establish a “clear showing” that its alleged loss is irreparable harm.

In *Federal Leasing, Inc. v. Underwriters at Lloyd’s*, Federal purchased computers and then marketed them “through leases or condition sales agreements to commercial and government users.” 650 F.2d 495, 496–97 (4th Cir. 1981). Federal borrowed funds from investors to purchase the computers, and these loans were repayable immediately if a customer terminated a lease contract. *Id.* Federal obtained an insurance policy from Underwriters to hedge

against the risk of unexpected cancellations. *Id.* When unexpected changes in the market occurred and Federal’s customers terminated their lease agreements in “unprecedented numbers,” Federal filed claims for the insured amounts with Underwriters, which were quickly denied. *Id.* Federal sued Underwriters and sought a preliminary injunction, requiring it to pay the legitimate insurance claims. *Id.* at 498. The Fourth Circuit granted the preliminary injunction because Federal was not seeking “the mere acceleration of a money debt otherwise compensable in damages,” but rather “*to preserve its existence and its business.*” *Id.* at 500 (emphasis added).

The degree of economic harm that MVP claims it will suffer is nowhere near the level the Fourth Circuit found necessary in *Federal*. The \$200 million alleged loss is merely 5.5 percent of the \$3.7 billion approved budget for the project, S.D. W. Va. Tr. 74:21–22, of which MVP built in a \$180 million contingency. S.D. W. Va. Tr. 74:23–24. Not only does MVP fail to allege that if it were to incur these monetary penalties, either its existence would be threatened or that the viability of the project would be in question, it concedes that a five percent increase is *not* an unusual increase in cost on a project of this scale. W.D. Va. Tr. 198:17–20. Therefore, MVP has failed to “clearly show” that the alleged economic loss would “cause extreme hardship to it,” or even threaten its destruction. *Air Transport Ass’n of Am.*, 840 F. Supp. 2d at 336 (citing *Gulf Oil Corp.*, 514 F. Supp. at 1026).

In *Sage*, the Fourth Circuit found that East Tennessee Natural Gas (“ETNG”), a natural gas pipeline company, would suffer irreparable harm without a preliminary injunction. *E. Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 828–29 (4th Cir. 2004). While the Fourth Circuit held that a \$5 million loss due to construction delays constituted irreparable harm, the legal framework under which the court decided *Sage* and the specific facts of the case make its holding inapplicable here. To begin, the *Blackwelder* framework that the court applied in *Sage* is

significantly different from the current Fourth Circuit and Supreme Court preliminary injunction jurisprudence. Before the Supreme Court’s decision in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008), district courts in the Fourth Circuit used the *Blackwelder* framework when determining whether to grant a motion for a preliminary injunction. While all four factors are relevant in the *Blackwelder* “balance-of-the-hardship test” it further provides:

The two more important factors are those of probable irreparable injury to plaintiff without a decree and of likely harm to the defendant with a decree. If that balance is struck in favor of plaintiff, it is enough that grave or serious questions are presented; and plaintiff need not show a likelihood success.

Blackwelder Furniture Co. of Statesville v. Selig Mfg Co., 550 F.2d 189, 196 (4th Cir. 1977).

The Fourth Circuit subsequently found that the “sliding scale” approach in *Blackwelder* “stands in fatal tension” with *Winter*’s mandate that the moving party makes a “clear showing” of each of the preliminary injunction factors. *Real Truth About Obama*, 575 F.3d at 346. For example, *Blackwelder* merely required that the “harm to the plaintiff outweigh the harm to the defendant,” for the moving party to establish irreparable harm. *Id.* at 347 (citing *Blackwelder*, 550 F.2d at 196). Moreover, the sliding scale framework in *Blackwelder* “allows that upon a strong showing on the probability of success, the moving party may demonstrate only a possibility of irreparable injury.” *Id.* (citing *Blackwelder*, 550 F.2d at 195). The *Sage* court balanced the harms between ETNG and the landowners—a framework the Supreme Court expressly rejected in *Winter*—and concluded that “any harm to the landowners is clearly outweighed by [the company’s] need for the property.” *Sage*, 361 F.3d at 829; *Winter*, 555 U.S. at 22–23. Therefore, given that the demands of *Winter* and *Real Truth About Obama* are in direct contravention of the *Blackwelder* framework, *Sage*’s irreparable economic harm holding is not binding on this Court.

Never mind the fact that *Sage* was decided under a more lenient preliminary injunction test, even if this Court were to find that *Sage* is still binding precedent, there are also significant factual differences between *Sage* and the matter at hand that render its holding inapplicable. First, the period between ETNG’s motion for a preliminary injunction and its FERC-mandated deadline was significantly shorter than here. Without a preliminary injunction, “[i]t would not have been possible [for ETNG] to meet FERC’s deadline.” *Sage*, 361 F.3d at 829. That simply is not the case here. While MVP *prefers* to begin construction by February 2018, it is in no way required to do so to comply with the FERC-imposed deadline of October 17, 2020. Compl. Ex. 1, at 1, ECF No. 1-1. As discussed above, MVP prepared alternative construction schedules for the pipeline to account for different start dates. *See* S.D. W. Va. Tr. 86:15–17; J.A. 3344–45. One such schedule contemplates that if MVP begins tree clearing on November 17, 2018, it would be able to place the full pipeline into service by December 7, 2019—nearly eleven months before its FERC deadline. J.A. 3345. Second, while ETNG was subject to construction penalties just as MVP is, it was also “under contractual obligation to provide natural gas to several electric general plants and local gas utilities by certain dates.” *Sage*, 361 F.3d at 829. Absent a preliminary injunction, the court found that ETNG would have been “*forced* to breach [those] contracts.” *Id.* (emphasis added). MVP has not made representations that it is bound to any similar agreements, nor absent a preliminary injunction, would it be forced to breach any such agreements. Furthermore, MVP has not made a clear showing that overcomes the presumption that “economic loss does not, in and of itself, constitute irreparable harm.” *Wis. Gas Co.*, 758 F.2d at 674.

The last category of irreparable economic harm that MVP claims it will incur if it must start next fall because of a preliminary injunction is administrative and carrying costs totaling

\$40 to \$45 million—merely one percent of the project’s total budget. W.D. Va. Tr. 204:9–16.

These carrying costs include payroll for staff and employees that it would keep, rents for warehouse and materials holding facilities, personnel hired to “manage the equipment,” leasing reservation fees, and additional legal fees. W.D. Va. Tr. 205. Importantly, many of these costs are already included in MVP’s \$3.7 billion budget for the pipeline project. W.D. Va. Tr. 207:13–20. MVP will also continue to receive value from the staff and employees that it continues to pay if the project was to be delayed. W.D. Va. Tr. 208:18–20. Lastly, MVP concedes that even if the total cost of the pipeline increased by one percent, it would continue with the construction of the pipeline. W.D. Va. Tr. 145:19–23. Therefore, MVP has failed to make a clear showing that it would suffer actual irreparable harm from the “additional” administrative and carrying costs if this court were to deny its motion for a preliminary injunction.

While MVP claims that its reputation and goodwill will be irreparably harmed absent a preliminary injunction, any harm to its reputation and goodwill will manifest as economic harm. “The loss of business opportunities, market share, and customer goodwill are typically considered to be economic harms.” *Air Transport Ass’n of America, Inc.*, 840 F. Supp. 2d at 335 (citing *Nat’l Ass’n of Mortgage Brokers v. Bd. of Governors of the Fed. Rsrv. Sys.*, 774 F. Supp. 2d 151, 183 (D.D.C. 2011)); see also *Clipper Cruise Line, Inc. v. United States*, 855 F. Supp. 1, 4 (D.D.C. 1994). Again, economic harm is not sufficient to make a clear showing that MVP will suffer irreparable harm. *Wis. Gas Co.*, 758 F.2d at 674.

Even if this Court were to find that reputational harm is distinct from economic harm, and therefore may constitute irreparable harm, damage to MVP’s reputation and goodwill can constitute irreparable harm only “so long as it is not too speculative.” *MicroAire Surgical Instruments, LLC v. Arthrex, Inc.*, 726 F. Supp. 2d 604, 640 (W.D. Va. 2010). Goodwill relates

to “the positive reputation, public confidence in, and customer loyalty to, an individual business entity.” *True Organic Prods., Inc. v. Cal. Organic Fertilizers, Inc.*, No. 1:18-CV-1278, 2019 WL 1023888, at *5 (E.D. Cal. Mar. 4, 2019). Furthermore, many courts have held that “a plaintiff must present ‘concrete evidence’ of harm to goodwill in order to show a likelihood of irreparable harm.” *Id.* at *5 (citing *Adidas Am., Inc. v. Skechers USA, Inc.*, 890 F.3d 747, 756 (9th Cir. 2018)).

Specifically, MVP alleges that if it did not get a preliminary injunction, it would be at a “very significant disadvantage in terms of negotiating” with general contractors in the future, S.D. W. Va. Tr. 57:10–11, and that it would be harder for it to do additional pipeline projects in the future. S.D. W. Va. Tr. 60:14–15. MVP has failed to present “concrete evidence” that these concerns constitute actual and imminent harm. Conversely, MVP admits that it has no other pipelines that it is currently planning to build, S.D. W. Va. Tr. 146:23–25, and therefore this alleged harm is not actual and imminent, but rather remote and speculative. *Direx Isr.*, 952 F.2d at 812.

In all, MVP has failed to carry its burden to make a clear showing that it will suffer actual and imminent irreparable harm absent a preliminary injunction.

B. A Preliminary Injunction is Not Appropriate Because MVP Failed to Avail Itself of Opportunities to Avoid the Irreparable Harm it Now Claims it Will Suffer Absent a Preliminary Injunction.

Because MVP failed to show “that [it] availed [itself] of opportunities to avoid the injuries of which [it] now complain[s], *Di Biase v. SPX Corporation*, 872 F.3d 224, 235 (4th Cir. 2017), and many of those injuries are self-inflicted, a preliminary injunction is not appropriate. *Salt Lake Tribune Pub. Co. v. AT&T Corp.*, 320 F.3d 1081, 1106 (10th Cir. 2003) (“We will not consider a self-inflicted harm to be irreparable.”). The self-inflicted harm MVP claims it will

suffer “is not irreparable injury.” *Second City Music, Inc. v. City of Chicago*, 333 F.3d 846, 850 (7th Cir. 2003).

All of the alleged irreparable harm that MVP claims it would suffer if it failed to meet the November 2018 in-service date is of its own making because MVP alone chose this in-service date. S.D. W. Va. Tr. 85. MVP developed alternative construction schedules, J.A. 3344–45, that contemplate construction beginning as late as November 2019, all of which would allow MVP to have its pipeline in service by the FERC-mandated deadline. S.D. W. Va. Tr. 81:22–25. MVP has acknowledged that it did not account for any of the alternative schedules in its negotiations and agreements with various shippers and general contractors. S.D. W. Va. Tr. 118:8–25. As a preliminary injunction is an equitable remedy, *Transcontinental Gas Pipe Line Co. v. 6.04 Acres of Land*, 910 F.3d 1130, 1152 (11th Cir. 2018), and self-inflicted harm is not the harm “that injunctions are meant to prevent,” *Livonia Props. Holdings, LLC v. 12840–12976 Farmington Road Holdings, LLC*, 399 F. App’x 97, 104 (6th Cir. 2010), MVP cannot now ask this court to protect it from the consequences of its own decisions. It is more than probable that this litigation would conclude in time for MVP to comply with the FERC deadline if this Court were to rule in its favor.

MVP claims that it will incur irreparable economic harm in the form of \$600 million in “lost revenues” from its Precedent Agreements and \$200 million in delay and termination fees from purchase orders associated with the Construction MSAs. Critically, not only did MVP enter into both the Precedent Agreements and the MSAs before receiving its FERC Certificate, but it did so at a time when FERC itself did not have a quorum of commissions to even issue the Certificate. S.D. W. Va. 43: 17–25. The MSAs are dated July 6, 2017, J.A. 3061, and the Precedent Agreements are dated October 20, 2015. J.A. 2889. The first purchase order MVP

issued under the MSAs was October 10, 2017, J.A. 3127, three days before FERC even issued the Certificate on October 13, 2017. Compl. Ex. 1, at 1, ECF No. 1-1. Therefore, MVP was willing, at the time of contracting, to subject itself to contractual liability with many unknowns.

Moreover, if MVP incurs the full \$200 million construction-related delay and termination fees, it would be its own doing and decision and thus not “irreparable harm” for purposes of a preliminary injunction. The purchase orders provide three penalty tables: (i) penalties for a delay in MVP issuing a “limited notice to proceed” for the contractors to begin tree felling work (“tree felling delay penalties”), J.A. 3129; (ii) penalties for a delay in MVP issuing a “final notice to proceed” (“FNTF”) for the contractors to construct the entirety of the pipeline (“FNTF penalties”), J.A. 3130; and (iii) termination fees if MVP were to terminate the purchase order before issuing an FNTF to the contractors (“termination penalties”), J.A. 3131. Each of these penalty tables is only triggered upon the happening of a specific date. For example, MVP will not suffer any tree felling delay penalties if it authorizes the contractor to begin work before February 26, 2018, J.A. 3129, nor will it incur FNTF penalties if it issues the FNTF before April 23, 2018. J.A. 3130. Per the purchase orders, for MVP to suffer its full \$200 million alleged harm, it would need to fully delay the LNTF for the tree felling, delay the FNTF authorization until July 9, 2018, and terminate the agreement before June 1, 2018. For obvious reasons, this is a physical impossibility. There is no world in which MVP terminates the purchase order before June 1, 2018, and then issues an FNTF on July 9, 2018.

Therefore, given the date structure of the penalty schemes, MVP is currently not subject to any delay fees. For the termination penalties, if MVP was to terminate the purchase order before January 1, 2018, or March 19, 2018, it would only be subject to a \$3,000,000 or \$5,000,000 penalty for each of the nine project spreads—\$27 million and \$45 million

respectively, J.A. 3131, far below its claimed \$200 million harm. If MVP chooses not to terminate the purchase orders before either January 1, 2018, or March 19, 2018, it clearly has not “availed [itself] of opportunities to avoid the injuries of which [it] now complain[s],” *Di Biase*, 872 F.3d at 235, and therefore is not entitled to a preliminary injunction to prevent its alleged irreparable harm.

Lastly, under the language of both the Precedent Agreements and the MSAs, MVP can invoke a force majeure clause to shield itself from any potential “irreparable” economic harm. The Precedent Agreements specifically provide that the term “Force Majeure” includes the “refusal of landowners to co-operate in the provision of [rights-of-way] necessary for completion of the projects.” J.A. 2901. It is important to remember that MVP has not yet obtained a Section 401 Water Quality Certification from the Commonwealth of Virginia for either its FERC Certificate or its Section 404 permit. The Precedent Agreement’s force majeure provision also includes MVP’s inability to obtain necessary permits. *Id.* If MVP decides not to invoke these force majeure clauses, any alleged “irreparable harm” that it suffers as a result is purely self-inflicted and thus insufficient to establish irreparable harm. *Livonia Props. Holdings, LLC*, 399 F. App’x at 104.

MVP has failed to make the clear showing necessary that any harm it will suffer absent a preliminary injunction is actual and imminent. Conversely, at best, the alleged harm is remote and speculative, as it is not even certain to occur to the magnitude at which MVP claims. While MVP might suffer some economic harm because of having to litigate its rights to Landowner’s constitutionally protected property interest, it has failed to show that this self-inflicted economic harm would be significant enough to warrant a preliminary injunction.

Applicant Details

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 Date of JD/LLB **May 10, 2024**
 Class Rank **15%**
 Law Review/Journal **Yes**
 Journal(s) **Indigenous Peoples' Journal of Law, Culture, and Resistance**
UCLA Law Review
 Moot Court Experience **Yes**
 Moot Court Name(s) **Pace Haub National Environmental Law Moot Court Competition**

UCLA Fall Internal Competition
UCLA Skye Donald Memorial 1L Competition

Bar Admission

Prior Judicial Experience

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Internships/	Yes
Externships	
Post-graduate	
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Specialized Work Experience

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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June 15, 2023

The Honorable Jamar K. Walker
United States District Court
For the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, Virginia 23510

Re: Judicial Clerkship Application

Dear Judge Walker:

I am a rising third-year law student at UCLA School of Law, and I am writing to apply for a position as a judicial clerk in your chambers for the 2024-2025 term. I chose a career in law because I have always felt a strong calling to public service, and I hope to begin my career by serving the people of Virginia as a judicial clerk in your chambers.

My experiences in both trial and appellate court settings have prepared me to be a strong contributor to your chambers and strengthened my desire to clerk at the district court level. As an extern for Judge David O. Carter last summer, I was able to hone my legal research and writing skills by drafting opinions and orders on myriad unfamiliar areas of law. Judge Carter's clerks gave me significant independence and responsibility, and I loved both the challenge and excitement of crafting a thorough order on a tight deadline. The pace and diversity of that work solidified my desire to clerk at the trial court level and I hope to bring those skills to bear delivering timely, high-quality work in your chambers. This spring semester I also worked with the Hualapai Tribe's Court of Appeals on bench memoranda and draft opinions, gaining further legal writing experience while navigating the nuances and difficulties of tribal court practice.

In addition, I have had the chance to strengthen my writing and organizational skills through journals at UCLA, evaluating legal writing as a Comments Editor on the *UCLA Law Review* and ensuring the accuracy of all citations as Managing Editor of the *Indigenous Peoples' Journal of Law, Culture, and Resistance*. My experience with moot court competitions has also allowed me to hone my writing and oral advocacy abilities. This year, I was very proud to be awarded Best Overall Brief during UCLA's fall internal competition and to be selected as a finalist in the Roscoe Pound Tournament of Champions.

Enclosed please find a copy of my resume, writing sample, and transcript, as well as letters of recommendation from Professors Cara Horowitz, Mark McKenna, and Sean Hecht. Thank you for your time in considering my application, and I look forward to hearing from you.

Sincerely,

Patrick Nugent

Patrick Nugent (they/them)

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EDUCATION

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- Honors:* Masin Family Academic Excellence Gold Award – Highest scorer in Torts and Public Natural Resources Law
Masin Family Academic Excellence Silver Award – Second highest scorer in Environmental Law and Policy
Fall 2022 Internal Moot Court Competition – Best Overall Brief, Best Respondent
- Journals:* UCLA Law Review, *Comments Editor*
Indigenous Peoples' Journal of Law, Culture, and Resistance, *Managing Editor*
- Moot Court:* Roscoe Pound Moot Court Tournament of Champions 2023, *Finalist*
National Environmental Law Moot Court Competition, *UCLA Team Member*
1L Skye Donald Moot Court Competition, *Participant, Top 10% finisher*
- Pro Bono Research:* HIV Criminalization in Maryland; California Judicial Diversity
- Specializations:* David J. Epstein Program in Public Interest Law and Policy
Critical Race Studies Specialization | Environmental Law Specialization

Brown University, Providence, Rhode Island

A.B., *with Honors*, Religious Studies, May 2021 | GPA: 3.88

- Thesis:* *Jesus, Justice, and Jubilee: The Biblical Foundations of "Liberal" Protestant Anti-Poverty Work*

EXPERIENCE

California Attorney General - Natural Resources Law Section

Los Angeles, California

Legal Intern

Summer 2023

UCLA Tribal Legal Development Clinic

Los Angeles, California/Peach Springs, Arizona

Student Participant

Spring 2023

- Researched and drafted bench memoranda and orders in pending Hualapai Nation Court of Appeals cases
- Conferred with justices to determine the proper resolution of issues of first impression

United States District Court, Central District of California

Santa Ana, California

Judicial Extern to the Honorable David O. Carter

June 2022–August 2022

- Drafted orders on motions to dismiss, summary judgments, reconsiderations, and habeas petitions
- Prepared Judge Carter for oral arguments and drafted questions for parties

El Centro VAWA/UVISA Clinic

Los Angeles, California

Volunteer

Fall 2021–Spring 2022

- Interviewed undocumented survivors of violent crimes in Spanish and translated declarations for USCIS

Tulsa County Public Defender's Office

Tulsa, Oklahoma

Intern

June 2019–August 2019

- Reviewed police reports and cell phone logs for accuracy in pending death-penalty case

Office of Residential Life, Brown University

Providence, Rhode Island

Residential Peer Leader (RA equivalent)

August 2018–March 2020

- Oversaw two upperclassmen dormitories, once in a team and once as the sole RPL for sixty students

Brown University Softball

Providence, Rhode Island

Video Coordinator and Manager

February 2018–March 2020

- Travelled with the team and operated live pitch-capture software and camera equipment at all games

LANGUAGES AND INTERESTS

Fluent in Spanish, conversational in Italian, novice in Scottish Gaelic, Duolingo beginner in Irish

Enjoy songwriting, online chess, South American literature, and watching baseball and softball

Student Copy / Personal Use Only | [905668172] [NUGENT, PATRICK]

University of California, Los Angeles
LAW Student Copy Transcript Report

For Personal Use Only

This is an **unofficial/student copy** of an academic transcript and therefore does not contain the university seal and Registrar's signature. Students who attempt to alter or tamper with this document will be subject to disciplinary action, including possible dismissal, and prosecution permissible by law.

Student Information

Name: NUGENT, PATRICK J
UCLA ID: 905668172
Date of Birth: 03/16/XXXX
Version: 08/2014 | SAITONE
Generation Date: June 07, 2023 | 05:51:32 PM
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Program of Study

Admit Date: 08/23/2021
SCHOOL OF LAW

Major:

LAW

Specializing in CRITICAL RACE STUDIES

Degrees | Certificates Awarded

None Awarded

Graduate Degree Progress

SAW COMPLETED IN LAW 513, 23S

Previous Degrees

None Reported

California Residence Status

Resident

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Fall Semester 2021

Major:
LAW

CONTRACTS	LAW 100	4.0	13.2	B+	
INTRO LEGL ANALYSIS	LAW 101	1.0	0.0	P	
LAWYERING SKILLS	LAW 108A	2.0	0.0	IP	
Multiple Term - In Progress					
TORTS	LAW 140	4.0	16.0	A	
CIVIL PROCEDURE	LAW 145	4.0	17.2	A+	
		<u>Atm</u>	<u>Psd</u>	<u>Pts</u>	<u>GPA</u>
Term Total		13.0	13.0	46.4	3.867

Spring Semester 2022

LGL RSRCH & WRITING	LAW 108B	5.0	18.5	A-	
End of Multiple Term Course					
CRIMINAL LAW	LAW 120	4.0	14.8	A-	
PROPERTY	LAW 130	4.0	14.8	A-	
CONSTITUT LAW I	LAW 148	4.0	14.8	A-	
ENVIRONMNTL JUSTICE	LAW 165	1.0	0.0	P	
		<u>Atm</u>	<u>Psd</u>	<u>Pts</u>	<u>GPA</u>
Term Total		18.0	18.0	62.9	3.700

Fall Semester 2022

FEDERAL INDIAN LAW	LAW 267	3.0	9.9	B+	
PUB NATURAL RESOURC	LAW 293	4.0	17.2	A+	
ART&CULTURL PROP LW	LAW 301	3.0	0.0	P	
PROB SOLV PUB INT	LAW 541	3.0	12.0	A	
GEOGRPHICL INDICATN	LAW 561A	0.5	0.0	IP	
Multiple Term - In Progress					
CLIMATE CHANGE	LAW 591	3.0	12.0	A	
		<u>Atm</u>	<u>Psd</u>	<u>Pts</u>	<u>GPA</u>
Term Total		16.0	16.0	51.1	3.931

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Spring Semester 2023

CRITCL RACE THEORY	LAW 266	4.0	13.2	B+
ENVIRONMENTAL LAW	LAW 290	4.0	16.0	A
JOURNAL LEADERSHIP	LAW 347	1.0	0.0	P
CALIF ENVIRNMNTL LW	LAW 513	3.0	12.0	A
GEOGRPHICL INDICATN	LAW 561B	1.0	0.0	P
End of Multiple Term Course				
TRIBAL LEGAL DEV	LAW 728	4.0	16.0	A

	<u>Atm</u>	<u>Psd</u>	<u>Pts</u>	<u>GPA</u>
Term Total	17.0	17.0	57.2	3.813

LAW Totals

	<u>Atm</u>	<u>Psd</u>	<u>Pts</u>	<u>GPA</u>
Pass/Unsatisfactory Total	7.0	7.0	N/a	N/a
Graded Total	57.0	57.0	N/a	N/a
Cumulative Total	64.0	64.0	217.6	3.818
Total Completed Units	64.0			

Memorandum

Masin Family Academic Gold Award
TORTS, s. 7, 21F
RESIDENCE ESTABLISHED 8/10/2022
Masin Family Academic Gold Award
PUB NATURAL RESOURC, s. 1, 22F
Masin Family Academic Silver Award
ENVIRONMENTAL LAW, s. 1, 23S

END OF RECORD
NO ENTRIES BELOW THIS LINE



Sean B. Hecht
Managing Attorney, California Regional Office

February 28, 2023

Dear Judge:

I write to recommend Patrick Nugent for a clerkship in your chambers. As the former co-director of UCLA School of Law's environmental law program and a member of the faculty for 20 years until last month, I got to know Patrick through Patrick's abiding interest in justice, law, and environmental issues, and through teaching them. In addition to counseling Patrick in my role as advisor and mentor to our students interested in environmental law, I taught Patrick in my Public Natural Resources Law course in the Fall of 2022. Patrick is intelligent, thoughtful, and diligent, and is among the most motivated, mature, and talented students I have had the pleasure to teach and supervise. In my experience, Patrick is extraordinarily intelligent, thoughtful, and diligent. As a former federal district court law clerk myself (Hon. Laughlin E. Waters, C.D.CA in 1995) I consider myself to have a strong sense of what qualities a federal law clerk needs to have. I believe Patrick will excel as a lawyer, and that in the shorter term they will make a terrific judicial law clerk. I give Patrick my highest recommendation.

Patrick excels at legal analysis (as evidenced by their stellar law school grades), and is detail-oriented and thorough. Patrick impressed me from the first days of class as an unusually bright and hard-working student. I rely on student participation in my course, and call on volunteers as well as on non-volunteers. Patrick was always prepared and always had something intelligent to say. Although they are not the type of student to dominate class discussions or to show off, Patrick often volunteered to answer questions or to comment on issues I raised in the class session. Patrick's comments were invariably legally and technically accurate, responsive to the points being discussed, and reflective of a high level of both preparation and skilled analysis. Patrick's comments reflected the intellect to cut to the heart of a legal issue as well as the ability to understand the complexities of both the legal and policy issues with which lawyers grapple. Patrick's significant success in moot court also reflects this skill set, along with careful preparation and the ability to anticipate and respond in real time to challenging questions.

I have also enjoyed getting to know Patrick. I think Patrick would be a terrific colleague. Patrick is easy to work with and is always well-prepared and personable in a low-key way, and this shows through in the way they work with fellow students. I think Patrick's follow-through, good judgment, and people skills will be great assets as a law clerk and lawyer.

Patrick also received the very top grade on my blind-graded final examination in Public Natural Resources Law, earning the highest grade in the course. The test covered a wide variety of topics, and required answers demonstrating sophistication in both knowledge of

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legal doctrine and ability to understand policy trade-offs. Patrick's examination answers were thoughtful, well-written, and cut to the heart of the issues in precisely the way I had intended. After I completed grading and Patrick asked me to write this recommendation, I reviewed Patrick's resume and transcript for the first time, and was pleased—though not at all surprised—to see how stellar their overall academic performance was.

In sum, I am convinced that Patrick has the intellectual ability, the work habits, the character, and the motivation to be a top-quality law clerk and attorney. Patrick will be an asset to your chambers. Please feel free to contact me at shecht@earthjustice.org or my direct phone line (213) 766-1068 to discuss Patrick further.

Sincerely,

A handwritten signature in black ink that reads "Sean B Hecht". The signature is written in a cursive, flowing style.

Sean B. Hecht



MARK MCKENNA
PROFESSOR OF LAW
FACULTY CO-DIRECTOR, UCLA INSTITUTE FOR TECHNOLOGY, LAW & POLICY

SCHOOL OF LAW
BOX 951476
LOS ANGELES, CALIFORNIA 90095-1476
Phone: (310) 267-4117
Email: mckenna@law.ucla.edu

June 7, 2023

Re: Letter of Recommendation for Patrick Nugent

Dear Judge:

This letter is to recommend Patrick Nugent for a clerkship position in your chambers. Based on my experience with Patrick, I am certain that they will be an excellent law clerk and ultimately an outstanding lawyer. I recommend them in the strongest terms.

I first became acquainted with Patrick when they were a student in my Torts class during the fall semester of 2021. Patrick was a regular and thoughtful participant in class discussions – not only when I called on them, but also on many occasions when they volunteered and responded their classmates' comments. Patrick routinely asked questions that went to the heart of an issue and probed the purposes of the legal rules, often with the goal of connecting various topics in the class. It was very clear that his classmates saw Patrick an intellectual leader in the class. When the class got stuck on something, they often were eager to hear what Patrick thought, and they took Patrick's comments seriously in formulating their own responses.

Unsurprisingly, Patrick did very well on the final exam, earning the highest grade in strong class. In recognition of Patrick's achievement, they the Academic Excellence Gold Award for the class (given to the student with the highest grade in a curved class). Patrick's overall performance so far in law school (a cumulative GPA of 3.818) has been equally strong. While UCLA does not formally rank students, I can tell you that UCLA adheres to a grading policy that strictly limits the number of A/A+ grades that can be given in any particular course. Specifically, faculty members cannot give A or A+ grades to more than 20% of students in any first year or large upper-division course. (Here I will note that it is remarkable that Patrick has earned A+ grades in two courses. While faculty differ in their willingness to give A+ grades, I understand them to be pretty rare. I have never given a student an A+ in 20 years of teaching.) I have no doubt that Patrick's academic performance will continue the rest of their law school career.

Given Patrick's outstanding performance in my Torts class, I was delighted when they and several of their classmates registered for a small seminar that I am co-teaching over the course of this academic year. Ours is one of UCLA's Perspectives courses—courses that focus primarily on a range of perspectives

June 7, 2023

Page 2

on law rather than on specific doctrinal rules. These seminars meet semi-regularly over the course of the year, and they are discussion heavy. Our class focuses on geographical indications as a way of talking about the role of place and culture in legal traditions. Here too, Patrick has been an extremely thoughtful and regular participant. Patrick has continued to play the role of intellectual leader, even while making sure to leave plenty of room for his classmates' interventions.

As you can see from Patrick's resume, they are very interested in public interest lawyering, and Patrick has already demonstrated a commitment to working in areas they are passionate about. In Patrick's first year and a half in law school, they have already volunteered with the El Centro VAWA/UVISA Clinic and participated in the UCLA Tribal Legal Development Clinic. Prior to coming to law school, Patrick interned at the Tulsa County Public Defender's Office. I know from our conversations that public interest work will always be a priority for Patrick, whether that is in a full-time position or an active pro bono practice. Patrick wants a strong clerkship opportunity in part so that they can continue to use their legal skills to the benefit of others.

I should also say that, on a personal note, I am confident that you would really enjoy working with Patrick. They are super smart, but also humble and very well-rounded. Those traits will serve Patrick well as a clerk and as a lawyer. I strongly recommend them. If you have any questions, please do not hesitate to contact me at (310) 267-4117 or at mckenna@law.ucla.edu.

Sincerely,



Mark McKenna
Faculty Co-Director, UCLA Institute of Technology, Law
& Policy

UNIVERSITY OF CALIFORNIA, LOS ANGELES

BERKELEY • DAVIS • IRVINE • LOS ANGELES • MERCED • RIVERSIDE • SAN DIEGO • SAN FRANCISCO



UCLA

SANTA BARBARA • SANTA CRUZ

Cara Horowitz
Andrew Sabin Family Foundation Co-Executive Director
Emmett Institute on Climate Change and the Environment

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Phone: (310) 206-4033
Email: horowitz@law.ucla.edu

February 28, 2023

To whom it may concern:

It is my great pleasure to give Patrick Nugent my strongest recommendation for a judicial clerkship. Patrick is a gifted researcher, writer, and legal thinker. In addition, Patrick is collaborative, unafraid of complexity, and a hard worker. They would be an asset to any chambers.

Patrick was a student in my climate law and policy seminar, an advanced discussion course that covers a broad swath of U.S. and international law and policy approaches to the problem of climate change. Their contributions in class demonstrated a strong grasp of the material and a genuine interest in engaging with new ideas and understanding complex issues. Patrick wrote three short papers for the class, including an especially strong one on potential litigation approaches to addressing the problem of “greenwashing,” by which corporations deceive consumers through advertising that unduly bolsters eco credentials. Patrick’s research and writing were outstanding; they were among the very strongest students in the class and received an “A”. I am not at all surprised to learn that Patrick earned the highest grade in not one but two of their large, curved lecture classes.

Patrick has also contributed significantly to the law school community. They serve as an editor of two journals, including the UCLA Law Review, and also regularly participate in moot court competitions. (“Participate in” undersells Patrick’s contributions, actually; I understand that they won Best Overall Brief and Best Respondent in our UCLA moot court competition.) They have volunteered to assist undocumented crime victims and to advance research into HIV criminalization.

I also want to say a word about Patrick’s empathy and collegiality. I supervised Patrick and a classmate in a national moot court environmental competition earlier this year, for which Patrick and the teammate submitted an excellent brief. However, a couple of weeks before the team could participate in the oral argument portion of the competition, Patrick’s teammate had to pull out for personal reasons, leaving Patrick no choice but also to withdraw. It was undoubtedly a disappointment to Patrick, who had worked hard to prepare and who would, I suspect, have done extremely well in the oral advocacy rounds. I know Patrick had been looking forward to the oral advocacy. But Patrick showed nothing but immediate support and understanding of the teammate’s decision, easing (I’m sure) the teammate’s considerable stress that week.

This is typical of my experiences with Patrick, who has shown maturity, generosity, and good grace in every interaction we’ve had. As we all know, such characteristics do not always come hand in hand with top-notch legal acumen; here, they do.

February 28, 2023
Page | 2

For all of these reasons, I give Patrick my highest recommendation. Please feel free to contact me if any additional information might be useful.

Sincerely,

A handwritten signature in black ink, appearing to read "Cara Horowitz". The signature is fluid and cursive, with the first name "Cara" and last name "Horowitz" clearly distinguishable.

Cara A. Horowitz

Patrick Nugent (they/them)

11140 Rose Avenue Apt 107, Los Angeles, California 90034 | (240) 400-0721 | Nugent2024@lawnet.ucla.edu

I prepared the following brief for UCLA School of Law's Fall Internal Moot Court Competition. The competition consisted of a closed-universe problem regarding gender-based affirmative action policies and the free speech protections afforded to professors at public universities. The questions presented were:

1. Whether Respondent's admissions policy, which gives preferential weight to male applicants, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?
2. Whether Respondent violated Petitioner's right to freedom of expression under the First Amendment to the United States Constitution, as applied to the states through the Due Process Clause of the Fourteenth Amendment?

The competition assigned me to represent the Respondent, Westsylvania State University, and the following brief represents entirely my own work with no outside feedback or edits. At the close of the competition, my submission was awarded Best Overall Brief.

Introduction

After being rejected from the only medical school to which she applied—Westsylvania State University (“WSU”)—Stephanie Jones used WSU’s own resources to wage a crusade against the school’s policies on the belief that she was unfairly denied admission. Jones leveraged her position as a WSU employee to create a hostile classroom environment and deliver remarks disparaging the school, its students, and its employees, leading to her termination. Now, she would have this Court vindicate her behavior by finding that the school’s affirmative action policy violates the Constitution’s guarantee of equal protection and that her termination infringed her right to free speech under the First Amendment. Both claims must fail.

First, WSU’s admissions policies do not violate the Equal Protection Clause of the Fourteenth Amendment under any level of scrutiny. WSU has a compelling interest in fostering many kinds of student body diversity to enhance educational outcomes. Its admissions policies—which consider gender among myriad other factors—are narrowly tailored to further that interest. Jones completely ignores the holistic nature of WSU’s admissions process and asks this court to single out the small piece of her application that gender represented. Second, the speech that prompted her termination was the culmination of Jones repeatedly leveraging her faculty position to inappropriately rail against WSU’s administration. Because Jones’ speech owed its existence to her work at WSU and grew out of her personal grievance with the school, it was not protected by the First Amendment and WSU was within its rights as an employer to fire her.

Statement of the Case

WSU is a prestigious, flagship university with extremely competitive admissions across all programs. R at 3. WSU’s medical school is a tier one school—ranked in the top fifty programs nationwide and best in its region—and most in-state applicants consider admission to

WSU Medical School unlikely. R at 3. The Medical School weighs many factors beyond academic prowess in building its incoming class, recognizing that it cannot accommodate every accomplished applicant and that a diverse and varied student body benefits those who are admitted. R at 3-6. WSU believes that diversity will “enhance the educational experience” and “help to break down stereotypes,” while homogeneity can hurt the prestige, ranking, and popularity of the school. R at 4-5. Accordingly, “good grades do not guarantee anyone a spot” at WSU, which combines passion, extracurriculars, legacy status, recommendations, and a mix of “Personal Ratings” and “Plus Factors” in making admissions decisions. R at 3, 6-7.

Personal Ratings factor in written materials, faculty assessments, and interviews to assess candidate personality, while Plus Factors comprise various intangibles and “other factors.” R at 6-7. While gender is one possible “other factor,” WSU also values candidates’ legacy status and diversity in geography, income, and area of study. R at 7. Candidates also earn extra points for applying by WSU’s priority deadline. R at 6. Such holistic evaluation allows WSU to achieve a “critical mass” of students with various unique characteristics in the incoming class. R at 7.

Before implementing any affirmative action policy, however, the school first attempted unsuccessfully to bolster gender diversity through other means. R at 5. WSU increased its recruiting budget to target male applicants, created scholarships for men who contribute to other types of diversity, and increased in-person and virtual outreach targeting male audiences. R at 5. Only after these efforts failed to achieve the desired gender balance for nearly a decade did WSU begin considering gender as an “other factor” to “increase overall diversity.” R at 5, 7.

Stephanie Jones is a Westsylvania native from an affluent family who has a background in science and medicine. R at 6. In 2019, she applied solely to WSU more than two months after the priority deadline. R at 6. Jones’ application was originally incomplete because she failed to

include a required transcript, and her file was completed less than a week before WSU closed applications. R at 6. Her MCAT score was only slightly above the national median and all female admits to WSU met or exceeded her credentials. R at 6. WSU denied Jones admission, stating that gender was “not decisive” in its decision. R at 6-7. Nearly four years later, Jones sued claiming that WSU’s admissions program unfairly discriminates based on gender. R at 10.

After it denied her admission, WSU hired Jones as a part-time lecturer in its undergraduate Women’s, Gender, and Sexuality Studies department, teaching two courses. R at 8. Jones was highly involved outside the classroom, advising student groups and using university funds to travel to conferences, conduct research, and publish papers. R at 8. In the classroom, Jones consistently fixated on WSU Medical School’s affirmative action procedures, using her position as a lecturer to air her grievances with the policy. R at 8-10. Jones forced male students to defend WSU’s policy and chastised female students who she felt did not oppose the policy forcefully enough. R at 8. She referred to students by chromosomes, ironically calling male students “XX-havers” and claiming they did not “buck the affirmative action stereotype” if she found their answers unsatisfactory. R at 8. Jones also openly clashed with one student, who felt that Jones created a “hostile environment” in the classroom, and her student reviews were below WSU’s average in fall 2021. R at 8-9.

WSU’s Dean of Diversity, Inclusion, and Equity (“DIE”) agreed that Jones created a hostile environment and demanded she stop referring to students with chromosomal pairs or commenting on the affirmative action policy. R at 9. Despite the DIE Dean alerting Jones that she would face discipline—up to and including termination—if she continued her inflammatory behavior, Jones refused to comply with his requests. R at 9. At first, she agreed to stop using chromosomal language if she could continue discussing affirmative action in class but returned

to using “XX” and “XY” in class within two weeks. R at 9. Upon learning this, the DIE Dean demanded Jones cease using chromosomal language or discussing affirmative action. R at 9.

At that point, Jones began leveraging other aspects of her position to share her views on the affirmative action policy, becoming even more outspoken in office hours and at student meetings. R at 9. At a faculty lunch, she called a colleague an “affirmative action baby.” R at 9. Jones also presented papers on affirmative action at conferences sponsored or funded by WSU, specifically criticizing WSU male faculty members for maintaining the policy. R at 9.

Jones’ vocal disagreement with the affirmative action policy finally came to a head at a rally held on WSU’s campus, where Jones delivered a slam poem criticizing affirmative action for men. R at 10. Though the student who introduced Jones did not mention her position, Jones identified herself as WSU faculty and “a victim of the corrupt system in society.” R at 10. Jones’ slam poem went viral on multiple platforms and led to a net decrease in WSU’s donation funding. R at 10. On the advice of the DIE Dean and WSU’s president, Jones was fired. R at 10.

The District Court granted summary judgment to WSU on both claims and the Fourteenth Circuit affirmed. R at 10-11, 16.

Argument

1. Gender-Based Policies Trigger Intermediate Scrutiny, but WSU’s Affirmative Action Policy is Constitutionally Permissible Under Any Standard of Review

For decades, intermediate scrutiny has been the proper standard for considering policies that differentiate based on gender.¹ Such policies need only be “substantially related to . . . an important governmental interest” to pass constitutional muster. *Kirchberg*, 450 U.S. at 459. However, even accepting dissenting Judge Shiner-Briggs’ invitation to ignore longstanding

¹ To cite only a few cases, this Court reached that conclusion in *U.S. v. Virginia*, 518 U.S. 515, 533 (1996), *Nguyen v. INS*, 533 U.S. 53, 60-61 (2001), *Kirchberg v. Feenstra*, 450 U.S. 455, 459 (1981), and *Michael M. v. Superior Ct.*, 450 U.S. 464, 468-69 (1981) (plurality finding that gender classifications are not “inherently suspect” and strict scrutiny should not apply to them).

precedent, R at 16, WSU's policy also survives strict scrutiny. Strict scrutiny requires a policy be "narrowly tailored to further compelling governmental interests." *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). WSU's desire for diversity and holistic review process satisfy this test.

a. WSU's Interest in Diversity Is Compelling Because it Enhances Educational Experiences, Fosters Understanding, and Helps Maintain WSU's Prestige

Fostering student body diversity is not only an important governmental interest but a compelling one, and WSU's interest here is no different. In *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), Justice Powell found diversity to be a compelling interest for universities and deserving of judicial deference. The Court later confirmed that decision in *Grutter*. *Grutter*, 539 U.S. at 325. Further refining the requirement in *Fisher v. University of Texas at Austin*, 579 U.S. 365, 381-82 (2016), the Court clarified that diversity alone is not an automatically compelling interest, but rather must be directly tied to tangible university goals. The goals in *Fisher* included destroying stereotypes, increasing cross-racial understanding, and creating a "robust exchange of ideas." *Id.* The Court found these interests compelling and deferred to the University's judgment even under strict scrutiny. *Id.*

Here, WSU's medical school admissions team articulated nearly identical goals for their own diversity efforts. WSU believes that a "critical mass" of male students can "enhance the educational experience, create cross-gender understanding and help to break down stereotypes" while a lack of gender diversity will hurt the school's prestige and reputation. WSU believes that students consider gender diversity "crucial" and that schools with skewed gender ratios see their public perceptions suffer. A top university like WSU, whose medical school is consistently its region's best, has a compelling interest in maintaining diverse classes to offer the best education possible. Thus, WSU has not only identified the important interest required for gender-based policies but exceeded that requirement by identifying a compelling interest in diversity.

b. WSU's Affirmative Action Policy Is Narrowly Tailored to Achieve Diversity Because Gender Is a Small Factor, WSU Disclaims Quotas, and Gender-Neutral Efforts Previously Failed to Achieve the Diversity Sought by WSU

Analyzing WSU's policy shows that it is not only substantially related to enrolling a diverse student body, but narrowly tailored to achieve the critical mass of diversity that WSU seeks. The university first pursued gender-neutral means of increasing diversity, then created a policy that weighs gender among many other factors, all while disclaiming quotas. As in *Grutter* and *Fisher*, WSU's narrowly tailored policy survives even the most exacting scrutiny.

In *Grutter*, the Court upheld the policy at issue because it did not institute quotas—as the policy in *Bakke* had—and maintained an individualized, flexible, and holistic review of applicants even while considering race as a “plus” factor. *Grutter*, 539 U.S. at 335-37. Additionally, the plan in *Grutter* was upheld because it gave “substantial weight to diversity factors besides race” and the school engaged in good faith consideration of race-neutral efforts before implementing its policy. *Id.* at 338-40. Then, in *Fisher*, the Court further noted that past failed efforts to increase diversity through race-neutral policies like establishing scholarships, bolstering recruitment budgets, and hosting recruiting events showed that race-neutral alternatives could not adequately further the university's interest. *Fisher*, 579 U.S. at 385.

Here, WSU has similarly narrowly tailored its affirmative action to foster diversity. The Medical School first attempted to increase gender diversity without instituting an affirmative action policy. WSU increased its recruitment budget to target male applicants with emails and visits, created scholarships for men who furthered other diversity categories, and used social media to reach out to potential male applicants. Only after eight years, when these attempts had not achieved the desired diversity, did WSU institute its affirmative action policies.

When it did implement that policy, however, gender remained one among many factors considered and WSU never implemented quotas for male students. Gender is only one potential “other factor” in the “Plus Factors” aspect of applications, along with geography, socioeconomic hardship, legacy status, and more. Separate from “Plus Factors,” WSU considers academic markers, “personal ratings,” recommendations, and timing of applications. Thus, WSU instituted the same type of individualized, flexible review seen in *Grutter*, viewing applicants holistically even as it noted gender as a potential plus factor. WSU also “disclaims quotas,” and while the admissions office set numerical goals related to male enrollees, it has never met them, implying that admission is not a simple matter of gender ratios. Accordingly, WSU’s policy, which was designed only after gender-neutral policies failed, is narrowly tailored to ensure that gender is one factor within its individualized and holistic process that eschews quotas. It therefore far exceeds the substantially related requirement normally placed on gender-based initiatives and is permissible under *any* level of equal protection analysis.

For Jones, nearly every piece of the admissions puzzle cut against her. She is from a well-to-do family in Westsylvania, has a typical prior education in biology and medicine, and sent an incomplete application past the priority deadline. Her MCAT score was only a few points above average, and every female admit to WSU either met or exceeded her academic credentials. Thus, WSU’s statement that gender was “not decisive” in denying Jones is hard to disbelieve and should lead this Court to find for WSU.

2. Jones’ Termination Did Not Infringe Her First Amendment Rights Because Her Speech Was Pursuant to Her Official Duties and Not on a Matter of Public Concern

Not satisfied with simply pressing her claim for gender discrimination several years removed from her admission denial, Jones also claims that the university’s decision to terminate her violated her First Amendment rights. Her claim fails at every step. Public employees are

entitled to First Amendment protections only if they are “speaking as citizens about matters of public concern.” *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006). If, instead, their speech comes “as an employee upon matters only of personal interest,” First Amendment protections are limited and federal courts defer to personnel decisions made by the government as they would to any other employer. *Connick v. Myers*, 461 U.S. 138, 147 (1983).

Applying this framework, Jones’ speech was entitled to no protection. First, by correctly applying *Garcetti* to university professors as public employees, this Court must find that Jones’ speech owed its existence to her employment and is not entitled to protection. Second, even if *Garcetti* does not apply, Jones’ speech was a mere extension of her personal complaint with the University and did not touch a matter of public concern. As such, under *Connick*, her speech was not protected when WSU justifiably exercised its discretion as an employer and fired her.

a. Jones’ Speech Owed its Existence to Her Position at WSU and Was Unprotected

The speech leading to Jones’ termination owed its existence directly to her position as a faculty member at WSU. It occurred in the classroom, during office hours, while serving as a faculty advisor, at conferences funded by WSU, in conversations with other faculty, and, finally, at an event on WSU’s campus where Jones introduced herself as a WSU employee. As such, under *Garcetti*, Jones’ speech was clearly “pursuant to [her] official duties,” and is entitled to no protection under the First Amendment. *Garcetti*, 547 U.S. at 421.

In *Garcetti*, the Court established that, as a threshold matter, speech by a public employee is not protected if it occurs “pursuant to their official duties.” *Id.* Looking past official job descriptions, which are often unhelpful in delineating an employee’s actual duties, the Court instead allowed restrictions on “speech that owes its existence to a public employee’s professional responsibilities.” *Id.* at 421, 424-25. Because the speech at issue in *Garcetti* was a

memo written as part of a district attorney’s duties in exercising prosecutorial discretion, the Court found that the speech at issue did owe its existence to the respondent’s employment and was therefore unprotected. *Id.* at 421. The same result follows here.

Though Jones was originally hired only to teach her two courses, her speech also came during other activities sponsored and funded by WSU. Jones spoke while being paid extra to advise student groups, availing herself of WSU funding for school-encouraged research and conferences, insulting colleagues, and introducing herself as a WSU professor at a rally on campus. To hold that such speech did not owe its existence to her faculty position would be to limit her job to simply the courses in her job description, against the mandate in *Garcetti* to engage in a “practical” assessment of employee duties. *Garcetti*, 547 U.S. at 424.

While the dissent below is correct that *Garcetti* left open whether speech pursuant to teaching and scholarship might necessitate a different threshold inquiry, this Court should nonetheless find that *Garcetti* applies to Jones’ speech. Arguing that academic freedom creates a higher level of speech protection, the dissent points to circuit cases that would protect nearly any speech by a professor. However, the true nature of academic freedom and the dangers of the dissent’s logic militate against such a reading and for applying *Garcetti* to this case.

First, the dissent improperly vests the interest in academic freedom with individual professors rather than the universities that employ them. As the Fourth Circuit noted in *Urofsky v. Gilmore*, academic freedom—such as it exists in the First Amendment context—has historically allowed *institutions* to choose their own directions and orient their scholarship accordingly. *Urofsky v. Gilmore*, 216 F.3d 401, 412 (4th Cir. 2000) (“The Supreme Court . . . appears to have recognized only an institutional right of self-governance in academic affairs.”).

Upholding that history, WSU has both the academic freedom to frame its mission and to terminate Jones for speech in conflict with that mission.

Second, the dissent is mistaken on the implications of affording Jones greater protection than other public employees. Parading out the horrors of granting a university discretion over its faculty, the dissent argues that such a rule would allow universities to “wield alarming power to compel ideological conformity.” (quoting *Meriwether v. Hartop*, 992 F.3d 492, 506 (6th Cir. 2021)). However, in doing so, the dissent ignores the horrible paraded in that case itself, where a professor’s speech was protected against university redress even as he callously refused to respect the identity of a transgender student. *Meriwether*, 992 F.3d at 511-12. Allowing professors to speak however they like, free of university oversight, opens the door to similar discriminatory speech in the name of a vague “academic freedom.” Therefore, to best protect *true* academic freedom, this Court should vest it in universities themselves.

b. Jones’ Speech Was an Extension of Her Grievance with the Medical School’s Policy and Was Not on a Matter of Public Concern

Even if *Garcetti* does not apply to Jones’ speech, she still fails to meet the threshold required for First Amendment protection because her speech was an outgrowth of her personal grievance with the university and not a matter of public concern. To determine whether speech was on a matter of public concern, courts look to “the content, form, and context of a given statement, as revealed by the whole record.” *Connick*, 461 U.S. at 147-48. Applying that approach to the dispute in *Connick*, the Court found that an employee circulating questions about policy and morale in the wake of a grievance did not constitute a matter of public concern. *Id.* at 148. Instead, the Court saw such questions as “mere extensions” of the underlying dispute and refused to extend protection due to the dysfunction that would ensue “if every employment decision became a constitutional matter.” *Id.* at 143, 148. The same result follows here.

Jones' speech in the classroom, at conferences, with colleagues, and at the rally centered constantly on affirmative action and was a mere extension of her disagreement with the university. Jones forced students to discuss WSU's policy, making men defend it and chastising women who failed to match her disdain. She also referred to students by chromosomal pairs, refused to stop doing so when asked, and clashed with a student over affirmative action. Bringing up affirmative action whenever possible, she referred to a male colleague as "an affirmative action baby" and accused her male students of "failing to buck the affirmative action stereotype" if she disliked their answers. When Jones did speak publicly on affirmative action at the rally, she introduced herself as "a victim of the corrupt system in society" in clear reference to feeling slighted by WSU's admission denial. Rather than furthering an open debate on affirmative action, these repeated indiscretions were mere extensions of Jones' dissatisfaction with her admissions results. Therefore, they did not touch a matter of public concern.

Finally, the dissent below's reliance on *Demers* is inapposite. *Demers* concerned a professor offering opinions on modifying the structure of his school's communications program, "at a time when the [school] itself was debating some of those very suggestions." *Demers v. Austin*, 746 F.3d 402, 417 (9th Cir. 2014). In contrast, Jones did not enter an ongoing debate on WSU's affirmative action policy, but rather pushed her own complaints about the policy at inappropriate times. She clashed in class, created a hostile environment, and insulted colleagues. When Jones did speak in a forum potentially open to a true affirmative action debate at the rally, she still introduced herself as a "victim of the corrupt system," underscoring that her words dealt with her perceived personal slight by WSU. Thus, unlike the proposal in *Demers*, Jones' speech in class, at conferences, and at the rally was merely an extension of her misgivings about the

policy and not legitimate debate on a matter of public concern. Her speech merits no First Amendment protection and WSU had the right as an employer to discipline her for it.

Conclusion

For the foregoing reasons, the Court should affirm the Fourteenth Circuit and find that WSU's actions violate neither the Equal Protection Clause of the Fourteenth Amendment nor the First Amendment.

Applicant Details

First Name **David**
 Last Name **Olin**
 Citizenship Status **U. S. Citizen**
 Email Address dolin@jd24.law.harvard.edu
 Address

Address
Street
6 Belmont St. Apt. 2
City
Somerville
State/Territory
Massachusetts
Zip
02143
Country
United States

Contact Phone Number **(310) 694-1063**

Applicant Education

BA/BS From **University of California-Berkeley**
 Date of BA/BS **December 2019**
 JD/LLB From **Harvard Law School**
<https://hls.harvard.edu/dept/ocs/>
 Date of JD/LLB **May 23, 2024**
 Class Rank **School does not rank**
 Law Review/Journal **Yes**
 Journal(s) **Harvard National Security Journal**
Harvard Law and Policy Review
 Moot Court Experience **No**

Bar Admission**Prior Judicial Experience**

Judicial Internships/Externships **No**
 Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Mack, Kenneth
kmack@law.harvard.edu
617-495-5473

Sunstein, Cass
csunstei@law.harvard.edu
617-496-2026

Gould, Jonathan
gould@berkeley.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

David Olin

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June 12th, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse, 600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to apply for a clerkship in your chambers for the 2024 – 2025 term. I have been given a professional recommendation to serve in the United States Navy Judge Advocate General's Corps after graduating from law school, which I plan on deferring for one year so that I can first clerk in your chambers. Currently, I am a rising third-year student at Harvard Law School, where I have participated in legal scholarship by working as a research assistant for multiple professors and serving on the executive masthead of the *Harvard National Security Journal* and the *Harvard Law and Policy Review*. I have further developed my legal research and writing skills across a variety of professional experiences, including writing motions for federal judges at the US Attorney's Office for the District of Massachusetts and preparing federal judges for confirmation hearings at the Department of Justice Office of Legal Policy.

I have attached my resume, transcripts, and a writing sample for your review. The following people will be submitting letters of recommendation on my behalf separately:

- Professor Cass Sunstein, Harvard Law School, csunstei@law.harvard.edu, (773) 550-2580
- Professor Kenneth W. Mack, Harvard Law School, kmack@law.harvard.edu, (617) 495-5473
- Professor Jonathan Gould, Berkeley Law School, gould@berkeley.edu, (857) 498-1438

If there is anything else that I can submit that would be helpful in assessing my application, please let me know. Thank you for your time and consideration.

Sincerely,

David Olin

David Olin

6 Belmont St. Apt. 2, Somerville, MA 02143 | (310) 694-1063 | dolin@jd24.law.harvard.edu

EDUCATION

Harvard Law School, Cambridge, MA

Juris Doctor Candidate

Expected May 2024

Honors: Dean's Scholar Awards in Legislation and Regulation and the United States Supreme Court Seminar
 Activities: *Harvard National Security Journal*, Executive Editor
Harvard Law and Policy Review, Submissions Editor
 American Constitution Society, Programs Chair
 Research Assistant for Professors Kenneth Mack, Jonathan Gould, and Cass Sunstein

University of California, Berkeley, Berkeley, CA

Bachelor of Arts, *summa cum laude* in Political Economy

December 2019

Honors: Regents' and Chancellor's Scholar
 Winner of the 2019 Elie Wiesel National Essay in Ethics Prize

EXPERIENCE

Senator Richard Blumenthal, Judiciary Committee Staff; Washington, DC

Summer Law Clerk

Incoming July – August 2023

O'Melveny and Myers; Los Angeles, CA

Summer Associate

May – July 2023

- Drafted and filed motions for the Board of Immigration Appeals as part of the firm's pro bono practice
- Prepared attorneys to conduct client interviews and worked directly with pro bono clients on their cases
- Wrote legal research memos to assist attorneys with ongoing consumer contracts litigation

U.S. Attorney's Office for the District of Massachusetts, National Security Unit; Boston, MA

Legal Extern

September – December 2022

- Drafted elements of prosecution memoranda responding to a variety of national security offenses
- Researched questions of criminal law and national security and distilled law enforcement evidence
- Developed strategies for domestic terrorism prosecution and presented to Assistant U.S. Attorneys

Department of Justice, Office of Legal Policy; Washington, DC

Legal Intern

May – July 2022

- Vetted nominees for federal judgeships and created materials to prepare them for Senate confirmation
- Drafted presidential proclamations for the Department of Justice to recommend to the White House
- Researched emerging legal questions surrounding the regulation of drones and their use by law enforcement

Pennsylvania Democratic Party; Allentown, PA

Regional Operations Coordinator

September – November 2020

- Managed voter activation centers in Pennsylvania to organize and deploy thousands of volunteers
- Oversaw distribution of hundreds of thousands of essential campaign supplies in the region

Democratic National Committee; Washington, DC

Delegate Tracker

March – August 2020

- Coordinated with State Parties to certify over 5,100 presidential delegates in every state and territory
- Implemented electronic voting for the first time ever in a Democratic National Convention

Bay Area JusticeCorps; San Francisco, CA

Student Member

September 2017 – May 2018

- Assisted self-represented litigants at the San Francisco Superior Court, working on 80 cases in total
- Collaborated with attorneys to present legal information regarding family law to litigants in group seminars

PERSONAL

Interests include backpacking in national parks, volleyball, drawing, science fiction novels, the LA Dodgers.

Record of: David A Olin
Current Program Status: JD Candidate
Pro Bono Requirement Complete

JD Program				7000W	Independent Writing Goldstein, Rebecca	H	1
Fall 2021 Term: September 01 - December 03				7000W	Independent Writing Gould, Jonathan	H	1
1000	Civil Procedure 5	H	4	2190	National Security Law Baker, James	H	2
1001	Contracts 5	P	4	3202	The United States Supreme Court Sunstein, Cass	H*	2
1002	Criminal Law 5	H	4		* Dean's Scholar Prize		
1006	First Year Legal Research and Writing 5A	H	2			Fall 2022 Total Credits:	14
1005	Torts 5	H	4			Fall-Spring 2022 Term: September 01 - May 31	
	Goldberg, John			2103	Government Lawyer Whiting, Alex	P	2
	Fall 2021 Total Credits:		18			Fall-Spring 2022 Total Credits:	2
Winter 2022 Term: January 04 - January 21						Winter 2023 Term: January 01 - January 31	
1056	Pathways to Leadership Workshop for the Public Sector	CR	2	2249	Trial Advocacy Workshop Sullivan, Ronald	CR	3
	Crawford, Susan					Winter 2023 Total Credits:	3
	Winter 2022 Total Credits:		2				
Spring 2022 Term: February 01 - May 13						Spring 2023 Term: February 01 - May 31	
1024	Constitutional Law 5	H	4	2000	Administrative Law Sunstein, Cass	H	3
1006	First Year Legal Research and Writing 5A	P	2	2676	Advanced Issues in Administrative Law and Theory Vermeule, Adrian	P	2
2485	Law & Democracy: The Incomplete Experiment	H	2	2079	Evidence Clary, Richard	H	3
1003	Legislation and Regulation 5	H*	4	2439	New Technologies and the Law of War Kalpouzos, Ioannis	H	2
	Rakoff, Todd					Spring 2023 Total Credits:	10
	* Dean's Scholar Prize					Total 2022-2023 Credits:	29
1004	Property 5	H	4				
	Mack, Kenneth						
	Spring 2022 Total Credits:		16			Fall 2023 Term: August 30 - December 15	
	Total 2021-2022 Credits:		36	3242	Congress's Power of the Purse Price, Zachary	~	1
Fall 2022 Term: September 01 - December 31				8049	Democracy and the Rule of Law Clinic Schwartztol, Larry	~	3
2035	Constitutional Law: First Amendment	H	4	2086	Federal Courts and the Federal System Goldsmith, Jack	~	5
8017	Government Lawyer: United States Attorney Clinic	H	4				
	Whiting, Alex						
continued on next page							

Harvard Law School

Record of: David A Olin

Date of Issue: June 7, 2023

Not valid unless signed and sealed

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2994	Legal Tools for Protecting Democracy and the Rule of Law in America Schwartzol, Larry	~	2
3256	The Non-Delegation Doctrine in Foreign Affairs Goldsmith, Jack	~	2
Fall 2023 Total Credits:			13
Winter 2024 Term: January 02 - January 19			
2169	Legal Profession: Government Ethics - Scandal and Reform Rizzi, Robert	~	3
Winter 2024 Total Credits:			3
Spring 2024 Term: January 22 - May 10			
2050	Criminal Procedure: Investigations Griffin, Lisa Kern	~	3
2212	Public International Law Blum, Gabriella	~	4
Spring 2024 Total Credits:			7
Total 2023-2024 Credits:			23
Total JD Program Credits:			88
End of official record			

HARVARD LAW SCHOOL
 Office of the Registrar
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 Cambridge, Massachusetts 02138
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registrar@law.harvard.edu

Transcript questions should be referred to the Registrar.

~~~~~  
**In accordance with the Family Educational Rights and Privacy Act of 1974, information from this transcript may not be released to a third party without the written consent of the current or former student.**  
 ~~~~~

A student is in good academic standing unless otherwise indicated.

Accreditation

Harvard Law School is accredited by the American Bar Association and has been accredited continuously since 1923.

Degrees Offered

J.D. (Juris Doctor)
 LL.M. (Master of Laws)
 S.J.D. (Doctor of Juridical Science)

Current Grading System

Fall 2008 – Present: Honors (H), Pass (P), Low Pass (LP), Fail (F), Withdrawn (WD), Credit (CR), Extension (EXT)

All reading groups and independent clinicals, and a few specially approved courses, are graded on a Credit/Fail basis. All work done at foreign institutions as part of the Law School's study abroad programs is reflected on the transcript on a Credit/Fail basis. Courses taken through cross-registration with other Harvard schools, MIT, or Tufts Fletcher School of Law and Diplomacy are graded using the grade scale of the visited school.

Dean's Scholar Prize (*): Awarded for extraordinary work to the top students in classes with law student enrollment of seven or more.

Rules for Determining Honors for the JD Program

Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.

May 2011 - Present

<i>Summa cum laude</i>	To a student who achieves a prescribed average as described in the <u>Handbook of Academic Policies</u> or to the top student in the class
<i>Magna cum laude</i>	Next 10% of the total class following <i>summa</i> recipient(s)
<i>Cum laude</i>	Next 30% of the total class following <i>summa</i> and <i>magna</i> recipients

All graduates who are tied at the margin of a required percentage for honors will be deemed to have achieved the required percentage. Those who graduate in November or March will be granted honors to the extent that students with the same averages received honors the previous May.

Prior Grading Systems

Prior to 1969: 80 and above (A+), 77-79 (A), 74-76 (A-), 71-73 (B+), 68-70 (B), 65-67 (B-), 60-64 (C), 55-59 (D), below 55 (F)

1969 to Spring 2009: A+ (8), A (7), A- (6), B+ (5), B (4), B- (3), C (2), D (1), F (0) and P (Pass) in Pass/Fail classes

Prior Ranking System and Rules for Determining Honors for the JD Program

Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.

Prior to 1961, Harvard Law School ranked its students on the basis of their respective averages. From 1961 through 1967, ranking was given only to those students who attained an average of 72 or better for honors purposes. Since 1967, Harvard Law School does not rank students.

<u>1969 to June 1998</u>	<u>General Average</u>
<i>Summa cum laude</i>	7.20 and above
<i>Magna cum laude</i>	5.80 to 7.199
<i>Cum laude</i>	4.85 to 5.799

June 1999 to May 2010

<i>Summa cum laude</i>	General Average of 7.20 and above (exception: <i>summa cum laude</i> for Class of 2010 awarded to top 1% of class)
<i>Magna cum laude</i>	Next 10% of the total class following <i>summa</i> recipients
<i>Cum laude</i>	Next 30% of the total class following <i>summa</i> and <i>magna</i> recipients

Prior Degrees and Certificates

LL.B. (Bachelor of Laws) awarded prior to 1969.

The I.T.P. Certificate (not a degree) was awarded for successful completion of the one-year International Tax Program (discontinued in 2004).

June 07, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to lend my enthusiastic support to David Olin's clerkship application. David was an excellent student in my Property class last year, and has been an equally excellent research assistant for me this year. He is a clear writer and an incisive legal thinker. More importantly, David will succeed — and at an extremely high level — at anything he does. At a time when most law students are casting about for what to do in life, David has already committed himself to beginning his career in public service. He's interested in forward-looking ideas of what a criminal prosecutor can and should be, and already has significant experience in politics. He's taken on leadership positions both at Harvard and during his undergraduate studies. You will also be pleased to know that David has been accepted into the Navy Judge Advocate General's Corps — as a result an extremely rigorous competition, for which I recommended him strongly. He will begin his life as a practicing lawyer in a role of public service to his country. Even among the Harvard law student body, David immediately stands out for his maturity and keen intelligence. I believe he would be an excellent clerk.

I noticed David quite early in my Property class last Spring. He approached me after class to talk about the policy and practical implications of a particular legal doctrine we were discussing in class. He was already working on the National Security Journal and the Law and Policy Review. He wasn't shy about coming to office hours or talking after class about everything from Constitutional Takings doctrine to the policies of former President Barack Obama. In class, he was always sharp and insightful when I called on him — unusually so. I came to know him better than almost all the students in the class and have a good sense of him. He's unusually mature and thoughtful, as anyone who meets him will immediately discern. He always asked questions that were smart and probing, and he immediately connected what we were learning to pressing issues of policy in the larger world. We also talked a bit about possible future career paths as a prosecutor or in public service. Of course, he wrote an excellent, clear, and analytical answer to a very long exam that posed a series of difficult issue-spotter and essay questions. He earned a well-deserved Honors grade, and I would estimate that his exam performance would place him in about the top ten percent of the students in the class.

It was an easy decision to hire him as a research assistant this year. I received 15 or 20 applications from quite outstanding candidates, after I advertised for assistance with a project, I'm writing about the policies of President Obama's administration. It seemed evident that he would stand out even among that type of competition, and he has. I asked him to analyze a quite difficult and diffuse set of questions, involving the oft-repeated claim that the Obama administration didn't pay sufficient attention to the policy issues that affect African Americans. It's a difficult claim to parse, and David helped me narrow it down and frame it in a way that made sense. Still, it remained a diffuse project when he took it on. It potentially covers an extremely broad range of policies and encompasses a set of difficult questions concerning what exactly it would mean for policies to address African American interests and when it would be appropriate to formulate such policies. David gave me a superb initial memorandum. He'd reformulated the question, researched many of the policies in question, and gave me a memorandum that significantly clarified my own thinking on the subject. I asked him to write a second memorandum on the subject, which was just as good. There are two kinds of research assistants — the ones who do the type of work that a typical bright and hardworking Harvard student would do and the ones who have a greater drive and acuity of mind than the usual student. David is clearly among the second group.

It should be evident from the above that I think David is a strong applicant for a clerkship. He is also a very thoughtful and engaging person. He is evidently on his way to a career of public service in the law that will be quite distinctive. I can't think of a better way for him to begin than as a clerk in your chambers. Please let me know if I can be otherwise helpful.

Yours sincerely,

Kenneth W. Mack
Lawrence D. Biele Professor of Law
Affiliate Professor of History

Kenneth Mack - kmack@law.harvard.edu - 617-495-5473

June 09, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to recommend David Olin for a clerkship with you. He would be an exceptional choice. In my view, he is one of the very few best clerkship candidates in his class.

I got to know David in my seminar with Justice Breyer on the U.S. Supreme Court. David was extraordinarily clear-headed in class; he was also highly original. He did a great deal with the old idea that in the face of doubt, legislators should be assumed to be reasonable people acting reasonably. In fact, he showed an impressive ability to bring that idea in contact with a variety of problems in administrative law (involving, for example, the role of cost-benefit analysis). His paper might have been the best in the entire class.

I saw David close-up this past semester in the basic administrative law class and (at the same time!) a seminar in advanced administrative law. Usually, the first course would be a prerequisite for the latter, but the word "usually" doesn't belong in a sentence with the brilliant David Olin. He was my "go to" student for the hardest questions - in not just one of those classes but in both.

On the strength of his performance, I hired him as my research assistant for this summer. Characteristically, he started early, and his work to date has been first-rate. He is fast, he is a good writer, and he gets things done. I have a book coming out - Advanced Introduction to Behavioral Law and Economics -- and he shepherded it to completion with amazing competence and skill.

David is also a genuinely great guy. It is a delight to work with him. He would be a pleasure in your chambers.

I give him my very highest recommendation.

Sincerely,

Cass R. Sunstein
Robert Walmsley University Professor

Cass Sunstein - csunstei@law.harvard.edu - 617-496-2026

May 25, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to enthusiastically recommend David Olin for a clerkship in your chambers. As detailed below, I have been impressed with the quality of David's work as my research assistant in 2022–23, as well as his strong broader record at Harvard Law School. David is smart, diligent, thoughtful, and personable. I have no doubt that he will make a talented law clerk and an excellent lawyer.

I know David predominately through his time working as my research assistant. When I spent a semester as a visiting professor at Harvard Law School, David applied to work with me, and his application was the most impressive that I received. His work lived up to my high expectations of him. He wrote excellent memos on a range of legal issues. His work on various aspects of state constitutional law was especially impressive, and he produced useful materials on the structure of state governments, the role of direct democracy mechanisms like initiatives and referenda in the states, and the distinctive "fiscal constitutions" that state law enacts. Beyond the substance of this work, it highlighted for me several qualities that I am confident would serve David well as a law clerk: ability to quickly process information on challenging legal issues which are new to him; excellent written communication skills, including strong persuasive writing; strong oral communication skills; and the ability to meet deadlines and juggle competing demands on his time. I was so impressed with David's work that I retained him as a research assistant even when I left Cambridge, and his work has continued to be very strong.

More broadly, David's very strong performance at Harvard Law School attests to his first-rate legal abilities. Academically, he has received a grade of "honors" or higher in nearly every graded course he has taken, which I estimate places him in at least the top 20% of the Harvard Law School class (if not higher). His Dean's Scholar Prizes in his "Legislation and Regulation" and "The U.S. Supreme Court" classes attest to his ability to closely reason through statutory and constitutional questions, respectively, which will serve him well as a law clerk. Also relevant is his experience with the U.S. Attorney's Office in Massachusetts. There, he drafted memos for senior prosecutors, digested evidence, and researched novel questions of criminal law and national security law. These legal practice skills naturally translate to the context of a judicial chambers.

Finally, David has a winning set of personal qualities. He is deeply committed to public service, as evident from his desire to serve in the Navy rather than undertaking more common career paths for Harvard graduates. He is very diligent and efficient without sacrificing care. He is warm, easygoing, and a pleasure to be around. I have no doubt that he would get along well with you, with chambers staff, and with his co-clerks.

For these reasons, I strongly recommend David for a law clerk position. Please do not hesitate to reach out with any questions.

Sincerely,

Jonathan Gould

Jonathan Gould - gould@berkeley.edu

David Olin

6 Belmont St. Apt. 2, Somerville, MA 02143 | (310) 694-1063 | dolin@jd24.law.harvard.edu

Writing Sample:

The following paper was the final assignment for my seminar on the US Supreme Court taught by Justice Stephen Breyer and Professor Cass Sunstein. It received a Dean's Scholar Prize.

I. INTRODUCTION

Statutes are intentional documents. They exist to make law that serves a purpose in the social order. It follows logically that in considering statutes, courts should be concerned with what that purpose is. This approach was a key tenant of the Legal Process School in the mid 20th century, which saw judiciary's role in interpreting a statute's purpose as part of a broader institutional framework of reasoned, intentional lawmaking.¹ Henry Hart and Albert Sacks, in their seminal work "The Legal Process," argued for a presumption that "the legislature was made up of reasonable persons pursuing reasonable purposes reasonably."² If, as the Legal Process theorists believed, statutory interpretation is about effectuating the legislature's purpose, then assuming a "reasonable legislator" is a useful tool when trying to determine purpose from contextual evidence.³ By interpreting statutes with that presumption in mind, courts help the lawmaking process work even when facing situations unpredictable to the law's drafters.

The reasonable legislator is helpful as part of a Legal Process understanding of the judiciary's role, but it could also be understood in another way – as a substantive canon of statutory interpretation. Such a canon would state that absent a precise indication of legislative intent a term should be read in the manner that a reasonable legislator would have given it in pursuing the goals of the statute. To draw from Hart and Sacks's words, laws should be read to pursue reasonable purposes in a reasonable way. Though not regularly described as a canon, this belief can be seen in notable cases where the Supreme Court engages in purposivist statutory interpretation.⁴ The effect of this canon is to create an outer boundary of interpretive possibilities

¹ See DAVID KENNEDY & WILLIAM W. FISHER, *THE CANON OF AMERICAN LEGAL THOUGHT* 245 (2018).

² HENRY M. HART & ALBERT M. SACKS, *THE LEGAL PROCESS* 1125 (1958).

³ See John F. Manning, *Inside Congress's Mind*, 115 COLUMBIA L. REV. 1911, 1913 (2015).

⁴ See discussion *infra* Section III.A.

while still preserving a variety of competing interpretations within the limits of reasonability.⁵ The canon is purposivist in the sense that it presumes courts care about legislative purpose, but the canon of a reasonable legislator can still coexist with textualist reasoning. Though not limited to the administrative law context, it is an especially effective tool when courts review agency action and provides a superior understanding of Congress's relationship to agencies than the major questions doctrine.⁶

In a textualist era, the purposivism of the Legal Process School that led to the concept of the reasonable legislator can seem irrelevant.⁷ However, within the confines of textualism, consideration of a reasonable legislator's intentions can still help resolve statutory ambiguities.⁸ There are also connections between the canon of the reasonable legislator and the logic behind doctrines where the Court has departed from strict textualist and originalist analysis such as the nondelegation doctrine.⁹ There is no better way to integrate the idea of the reasonable legislator with the current legal world than by defining it as a canon. To that end, this piece discusses the possible "canonization" of the reasonable legislator using two complementary meanings of that word. First, as a nominalization describing the making of a canon of construction. Second, in the laudatory sense – giving the reasonable legislator the place of respect he or she deserves in statutory interpretation.

⁵ See discussion *infra* Section III.C.

⁶ While this piece only considers statutory interpretation, the Legal Process approach can also be useful for regulatory interpretation. See generally Kevin M. Stack, *Interpreting Regulations*, 111 MICHIGAN LAW REVIEW 355 (2012).

⁷ See, e.g., Harvard Law School, The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes, YOUTUBE (Nov. 25, 2015) ("We're all textualists now.") <https://www.youtube.com/watch?v=dpEtszFT0Tg>.

⁸ See John F. Manning, *Chevron and the Reasonable Legislator*, 128 HARV. L. REV. 457, 458 (2014) [hereinafter Manning, *Reasonable Legislator*].

⁹ See discussion *infra* Section III.D.

II. THE MEANING OF CANONS AND THEIR RELATIONSHIP TO THE REASONABLE LEGISLATOR

A. Defining Canons of Statutory Interpretation

Before canonizing the reasonable legislator, it is worthwhile to briefly consider the meaning of a canon of statutory interpretation. Canons are typically presented as a set list, often in Latin, of traditional interpretive principles,¹⁰ but the concept of a canon is not so confined. Something can be considered a canon so long it is a background presumption in a judge's mind when working through statutory interpretation.¹¹ These presumptions can "influence [a judge's] understanding of legislative text without resort to explicit canons."¹² It also need not be a presumption used in every instance. Karl Llewellyn famously noted that every canon has an equal and opposite canon.¹³ As such, there are multiple ways of reading statutes that are simultaneously "correct."¹⁴ Under this framework, canons are manners of thinking about an abstract problem rather than mathematical rules to solve an equation.

Even though they can be deployed to serve many ends, canons provide essential guidance to judges examining statutes. Reading statutes without canons would be akin to reading language without any "rules of syntax or grammar."¹⁵ In addition to providing a useful roadmap for judges, canons can also create a relationship between the judiciary and the legislature where judges better enact the instructions of the legislature and legislators better understand how to

¹⁰ See, e.g., ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012).

¹¹ See Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 451 (1989) [hereinafter Sunstein, *Interpreting Statutes*] ("courts have always used something like 'canons' as background principles for interpretation").

¹² Jonathan Cannon, *The Sounds of Silence: Cost-Benefit Canons in Entergy Corp. v. Riverkeeper, Inc.*, 34 HARV. ENVIRO. L. REV. 245, 435 (2010).

¹³ See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3 VANDERBILT L. REV. 399, 401-06 (1950).

¹⁴ See *id.* at 396.

¹⁵ Sunstein, *Interpreting Statutes*, *supra* note 11, at 454.

write statutes the courts will uphold.¹⁶ As a set of interpretative norms, canons can serve to promote judicial consistency.¹⁷ Substantive canons, including the canon of the reasonable legislator, also make normative judgments that can improve the legal process.¹⁸ Of course, the use of canons has had more than its fair share of critiques, from Llewellyn's realist view of canons as *post-hoc* justifications¹⁹ to empirical discrepancies between the canons and the understandings of people actually drafting statutes.²⁰ These critiques are salient, but canons nonetheless enjoy widespread use today. The movement of the courts towards textualism has made canons an especially common part of statutory interpretation.²¹ These factors make it all the more valuable to consider the principle of the reasonable legislator as a canon.

Given the utility of canons and the frequency with which they are used, there are naturally debates about their limits. Dynamic understandings of canons can include judicial tools like examining legislative history and giving deference to agencies' administrative interpretations.²² However, a more limited view of canons holds that they require longevity, frequency, and consistent application by the courts to differentiate them from rules of statutory interpretation confined to certain cases.²³ Rather than engage at length in this debate, this work

¹⁶ See *id.* at 456-59; William N. Eskridge, Jr. & Philip P. Rickey, *Foreword: Law As Equilibrium*, 108 HARV. L. REV. 26, 67 (1994) ("Knowing the interpretive regime into which statutes will be developed over time, the players in the legislative bargaining process will be better able to predict what effects different statutory language will have.").

¹⁷ See Neil M. Gorsuch, Lecture, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. RES. L. REV. 905, 917 (2016) ("[W]hen judges pull from the same toolbox [...] we confine the range of possible outcomes and provide a remarkably stable and predictable set of rules people are able to follow.").

¹⁸ See Sunstein, *Interpreting Statutes*, *supra* note 11, at 459-60.

¹⁹ See *id.* at 451-52.

²⁰ See generally, Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725 (2014).

²¹ See Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court's First Decade*, 117 MICH. L. REV. 71, 73 (2018). Of course, the textualists have favored some canons over others. See *id.* at 101-04.

²² See Anita S. Krishnakumar & Victoria F. Nourse, *The Canon Wars*, 97 TEX. L. REV. 163, 167 (2018) (describing a dynamic view of canons attributed to Bill Eskridge).

²³ See *id.* at 181.

takes as its premise a broad view of what a canon may consist of. The canon of the reasonable legislator does have a long history of application behind it, but it is still more at home among expansive interpretations of the word “canon” that go beyond the lists of traditional canons beloved by textualists. However, even for those who adopt a more limited definition of canons, there is still reason for courts to apply the principle of a reasonable legislator when engaging in statutory interpretation.

B. Comparison with the Absurdity Doctrine

While canons can overlap, it is worth distinguishing the canon of the reasonable legislator from its nearest cousin: the absurdity doctrine. The absurdity doctrine is a canon that states that a provision in a statute must be interpreted to avoid a clearly absurd outcome, even if that is what its plain meaning would imply.²⁴ Under Llewellyn’s system of dichotomies, it is the anti-canon to the canon stating that “[i]f language is plain and unambiguous it must be given effect.”²⁵ The doctrine comes from the textualist tradition, although it contradicts usual textualist principles.²⁶ While its merits have been debated, it is best thought of as a backstop to prevent the worst consequences of textualism.²⁷

Although the two are similar, the absurdity doctrine is far more limited than the canon of the reasonable legislator and notably less useful when considering judicial review of administrative agencies’ actions.²⁸ Justice Scalia wrote that the two conditions of the absurdity

²⁴ SCALIA & GARNER, *supra* note 10, at 234.

²⁵ Llewellyn, *supra* note 13, at 403.

²⁶ In truth, the absurdity doctrine has a long tradition in American law unrelated to the modern textualist movement. See *United States v. Kirby*, 74 U.S. 482 (1868). However, in contemporary law it is primarily referenced by textualists since purposivism easily encompasses the doctrine and extends beyond it.

²⁷ See John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2392 (2003) (arguing that a faithful adherence to textualism would require abandoning the absurdity doctrine, but modern textualists have not done so in order to keep the doctrine workable).

²⁸ There is also a view of the absurdity doctrine that claims it has nothing to do with legislative intent, whereas the canon of the reasonable legislator is entirely based on legislative intent. See generally Michael D. Cicchini, *The New Absurdity Doctrine*, 125 PENN. STATE L. REV. 353 (2021).

doctrine are that (1) “no reasonable person could intend” the result of reading a statute’s plain meaning and (2) that the absurdity “must be reparable by changing or supplying a particular word or phrase whose inclusion or omission was obviously a technical or ministerial error.”²⁹

The canon of the reasonable legislator differs from both these criteria. It asks not what a reasonable person would want, but rather assigns normative value to an institution made of reasonable legislators and then asks what such an institution would do. More importantly, it does not limit itself to technical errors and poorly applied language and can indeed consider “substantive errors arising from a drafter’s failure to appreciate the effect of certain provisions.”³⁰ Finally, though not necessarily incompatible with textualism in practice, the canon of the reasonable legislator comes from purposivist thought and genuinely considers legislative intent rather than merely acting as an emergency release valve for textualism.

III. THE CANON OF THE REASONABLE LEGISLATOR IN ACTION

The canon of the reasonable legislator serves to confine the realm of possibility for courts when considering what a statute allows. However, the effect of this canon is not to push for one kind of result across all cases. A single canon can always be used to achieve multiple outcomes, and several different interpretations of a statute can fall within what a reasonable legislator might allow. Even so, the canon allows courts to consider whether a certain outcome achieves a law’s purpose and then to exclude some possibilities as outside the boundaries of reasonability. It also provides a coherent means of thinking through statutory interpretation in a way that improves institutional incentives. In the context of judicial review of agency action, the canon of the

²⁹ SCALIA & GARNER, *supra* note 10, at 236.

³⁰ *Id.*; see also STEPHEN BREYER, ACTIVE LIBERTY 88 (2005) (“[the reasonable legislator concept] applies, for example, even when Congress did not in fact consider a particular problem.”); but see Cass R. Sunstein, *Avoiding Absurdity? A New Canon in Regulatory Law*, (John M. Olin Program in L. and Econ. Working Paper No. 158, 2002) (describing an absurdity canon for review of agency action and applying it to situations that Congress could not have anticipated).

reasonable legislator provides a way for courts to constrain agency actions clearly outside the boundaries Congress intended while still preserving the overall structure of the administrative state.

A. The Reasonable Legislator as the Basis for Purposivist Statutory Interpretation

Breyer writes that the reasonable legislator lies “at the heart of a purpose-based approach” to statutory interpretation.³¹ One classic illustration of this approach comes from *Holy Trinity Church v. United States*,³² where the Supreme Court considered whether a law against the importation of laborers barred an English rector from preaching to a church in New York.³³ The statute in question spoke generally of terms like “labor” and “service” and only made specific exceptions for “actors, artists, lecturers, singers, and domestic servants.”³⁴ As such, the Court acknowledged that textually the rector ought to be barred, but still ruled that he was not covered by the statute because it was “unreasonable to believe that [a] legislator intended to include the particular act” in the statute’s prohibition.³⁵ Phrased in reverse, a reasonable legislator pursuing the goals of the statute would not have barred such conduct. The Court did not go so far as to declare which purposes are reasonable or not, but it did look for contextual clues from elsewhere in the statute, legislative history, and contemporary events to determine what the statute’s purpose was.³⁶

The purposivist analysis of *Holy Trinity* flows from the concept of a reasonable legislator. Without this presumption, courts can’t make sense of the various pieces of contextual evidence

³¹ Breyer, *ACTIVE LIBERTY*, *supra* note 30, at 88; *see also* Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 895 (2003) (“[the reasonable legislator] may even be a necessary feature of purposivism; it may be conceptually impossible for judges to proceed by imagining what unreasonable legislators would do.”).

³² 143 U.S. 457 (1892).

³³ *Id.* at 458-59.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 463-65.

surrounding a statute.³⁷ Concerns about the effects of an influx of unskilled labor are only relevant because the Court assumes the legislature actually wants to remedy such an “evil.”³⁸ Whether this is the best policy choice for the nation is beyond the Court’s ability to determine, but for purposivist analysis the Court must presume the legislature was in fact attempting to pursue some kind of purpose.³⁹ Even the plain language of the statute is only informative if it was drafted through a rational process where the statute’s terms serve specific goals.⁴⁰ Applying the canon of the reasonable legislator, the Court can try to decide how that rational process would have ended up if presented with the specific case of the rector. To answer that question, the Court supposed that if a bill barring rectorors from entering the country was proposed, “[c]an it be believed that it would have received a minute of approving thought or a single vote?”⁴¹ With the legislature’s contextually-determined purpose in mind, the reasonable legislator’s ruling is clear, and the Court must follow it.

Holy Trinity is the paragon of purposivism, but the canon of the reasonable legislator can be incorporated into more contemporary analyses that start with textualism.⁴² Even in an affirmatively purposivist analysis, there is “no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.”⁴³

³⁷ HART AND SACKS, *supra* note 2, at 1379.

³⁸ *Holy Trinity*, 143 U.S. at 465.

³⁹ “What is crucial here is the realization that law is being made, and that law is not supposed to be irrational.” HART AND SACKS, *supra* note 2, at 1379. To the extent that such a law might be based on condemnable impulses like xenophobia, it is less clearly within the bounds of rationality. Under the canon of the reasonable legislator, a court might consider that inherently unreasonable and an invalid consideration, or it could be part of a reasonable response to popular desires.

⁴⁰ “It is a case where there was presented a definite evil, in view of which the legislature used general terms with the purpose of reaching all phases of that evil.” *Holy Trinity*, 143 U.S. at 472.

⁴¹ *Id.*

⁴² At least one work has argued that Legal Process purposivism differs from “*Holy Trinity* style” purposivism because Legal Process purposivism cares more about using statutory text to determine policy context. *See* note, *The Rise of Purposivism and Fall of Chevron: Major Statutory Cases in the Supreme Court*, 130 HARV. L. REV. 1227, 1229 (2017). Even if this distinction is accepted, *Holy Trinity* still demonstrates the Court’s use of the canon of the reasonable legislator, just with unusually little textual consideration in determining the statute’s purpose.

⁴³ *United States v. American Trucking Ass’ns*, 310 U.S. 534, 543 (1940).

Sometimes textual analysis incorporating a broader context can consider the role of the reasonable legislator. A recent example of this kind of reasoning is Justice Roberts’s opinion in *King v. Burwell*.⁴⁴ In *King*, a challenge was brought to the Affordable Care Act (ACA) based on the meaning of the term “exchange established by the State,” which, according to the petitioners, excluded federal exchanges.⁴⁵ Textually, the act defined states as “each of the 50 states,” and under its plain meaning a state exchange would naturally exclude a federal exchange.⁴⁶ At the same time, the majority acknowledged that applying the plain meaning of the term “state” would stop the IRS from offering tax credits to those using federal exchanges.⁴⁷ This would “destabilize the individual insurance market in any State with a Federal Exchange, and likely create [...] ‘death spirals’ that Congress designed the Act to avoid.”⁴⁸

No reasonable legislator would create an act that defeats itself.⁴⁹ The Court noted that the faulty structure was the result of individual congressional failures like “inartful drafting,” writing the bill “behind closed doors,” and a lack of “care and deliberation” that came from passing the bill through the reconciliation process to avoid the filibuster.⁵⁰ However, the Court still decided to base its reading of the statute on what Congress should do if made up of reasonable legislators rather than what its members actually did do. It ruled that the term “exchange established by the state” should be considered ambiguous so that the IRS could make rules giving tax credits to those on federal exchanges.⁵¹ By choosing to read the statute this way, the Court ensured that the ACA could continue to function as a productive piece of legislation. When given a choice

⁴⁴ 576 U.S. 473 (2015).

⁴⁵ *Id.* at 484.

⁴⁶ *Id.* at 487.

⁴⁷ *Id.* at 490.

⁴⁸ *Id.* at 491-92.

⁴⁹ *Id.* at 494 (“It is implausible that Congress meant the Act to operate in this manner.”).

⁵⁰ *Id.* at 491-92.

⁵¹ *Id.* at 497-98.

between a government that works and a government that doesn't, the canon of the reasonable legislator encourages courts to make the government work.

B. The Reasonable Legislator and Deference to Agency Interpretation

One of the most important areas where the reasonable legislator canon is visible is in judicial deference to the interpretations of agencies. Under the deference regime established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*,⁵² when considering an agency's interpretation of its governing statute, courts must first ask "whether Congress has directly spoken to the precise question at issue."⁵³ If Congress has not and the statute is ambiguous, the agency's interpretation has deference so long as it is "permissible."⁵⁴ Then Judge Breyer argued against this ruling on the grounds that a case by case approach to deference would better encompass the intentions of a reasonable legislator.⁵⁵ A reasonable legislator pursuing the goals of a statute reasonably would want to defer in some cases, such as narrow issues hinging on special knowledge, but not others, such as highly political decisions.⁵⁶ Breyer's preferred application of the reasonable legislator canon to deference was later used in *United States v. Mead Corp.*,⁵⁷ which required agencies to consider whether the legislature intended to delegate authority to the agency to "make rules carrying the force of law."⁵⁸ The case operates from the

⁵² 467 U.S. 837 (1984).

⁵³ *Id.* at 842.

⁵⁴ *Id.* at 843.

⁵⁵ Breyer writes:

It is nothing new in the law for a court to imagine what a hypothetically "reasonable" legislator would have wanted (given the statute's objective) as an interpretive method of understanding a statutory term surrounded by silence. Nor is it new to answer this question by looking to practical facts surrounding the administration of a statutory scheme. And, there is no reason why one could not apply these general principles, not simply to the question of what a statute's words mean, but also to the question of the extent to which Congress intended that courts should defer to the agency's view of the proper interpretation.

Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986).

⁵⁶ *See Id.* at 371.

⁵⁷ 533 U.S. 218 (2001).

⁵⁸ *Id.* at 227.

presumption that a reasonable legislator would defer to agency interpretations at some levels but not at others. Specifically, that it would not want to defer to customs ruling letters as having the force of law.⁵⁹

However, as with all canons, the canon of the reasonable legislator can be used to serve multiple ends. An alternative perspective on *Chevron* argues that a categorical grant of deference to the agency in cases of ambiguity, rather than a case by case examination of Congress's intent, is the form of deference a reasonable legislator would prefer.⁶⁰ As long as there is ambiguity, *Chevron* bases its deference on a presumption that a reasonable legislator would set up an institutional system giving the power of interpretation to the agency it has charged with pursuing a certain goal.⁶¹ Alternatively, a reasonable legislator might wish for deference to be determined based on agency hierarchy, rather than a categorical approach or a context-specific inquiry.⁶² The second step in *Chevron*, determining if the agency's interpretation is permissible, can also implicate the reasonable legislator canon if the court takes a purposivist approach and asks whether the agency's interpretation aligns with the goals of the statute.⁶³ As such, the canon of the reasonable legislator can be used to consider both what kinds of deference a reasonable legislator might allow and whether a reasonable legislator would consider a specific form of

⁵⁹ *Id.* at 231.

⁶⁰ See Manning, *Reasonable Legislator*, *supra* note 8, at 465 (“might a ‘reasonable legislator’ prefer rules over standards? *Chevron* tells us that the answer is yes.”); see also Abigail R. Moncrieff, *Reincarnating the “Major Questions” Exception to Chevron Deference as a Doctrine of Noninterference (Or Why Massachusetts v. EPA Got It Wrong)*, 60 ADMIN L. REV. 593, 608 (2008) (“[Some argue] a reasonable legislator in the modern administrative state would rather give law interpreting power to agencies than to courts.”)

⁶¹ See Manning, *Reasonable Legislator*, *supra* note 8, at 465.

⁶² See *id.* at 466 (citing David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 203).

⁶³ See Kent Barnett & Christopher J. Walker, *Chevron Step Two's Domain*, 93 NOTRE DAME L. REV., 1441, 1467-68 (2018). However, in applying a purposivist approach, judges can also move in the opposite direction and consider the goals of interest groups and individual legislators that may not be acting reasonably. See *id.* at 1453.

interpretation reasonable. No matter the approach that is taken, the canon is at the center of how courts consider deference to agency interpretations.

C. The Reasonable Legislator and Cost-Benefit Analysis

Considerations of cost-benefit analysis in agency action demonstrate how the canon of the reasonable legislator cabins the outer boundaries of statutory interpretation. In *Entergy Corp. v. Riverkeeper, Inc.*,⁶⁴ the Court addressed whether it was permissible for the Environmental Protection Agency to use cost-benefit analysis when a provision in the Clean Water Act was silent on whether to use it.⁶⁵ Specifically, the question was whether a “‘best technology available’ standard permits consideration of the technology's costs” if the agency chooses to do so.⁶⁶ The majority, conducting only a single step *Chevron* analysis, concluded that it was “well within the bounds of reasonable interpretation for the EPA to conclude that cost-benefit analysis is not categorically forbidden.”⁶⁷ The dissent argued that in the context of the Clean Water Act, the command to use the “best technology” meant the best available technology no matter the cost.⁶⁸

In a partial concurrence, Justice Breyer took the approach most consistent with the canon of the reasonable legislator by remaining open to a limited degree of weighing costs.⁶⁹ Drawing from the legislative history to support a purposivist analysis, Breyer found concrete policy reasons for Congress to have wanted to minimize the use of cost-benefit analysis.⁷⁰ However, he acknowledged that the agency could not blindly ignore costs because “every real choice requires

⁶⁴ 556 U.S. 208 (2009).

⁶⁵ *Id.* at 217.

⁶⁶ *Id.*

⁶⁷ *Id.* at 223.

⁶⁸ *Id.* at 240-41 (Stevens, J., dissenting).

⁶⁹ *See id.* at 230 (Breyer, J., concurring). Not coincidentally, Breyer has been described as “a quintessential Legal Process judge.” Manning, *Reasonable Legislator*, *supra* note 8, at 457.

⁷⁰ *Entergy*, 556 U.S. at 230.

a decisionmaker to weigh advantages against disadvantages.”⁷¹ The use of the word “best,” applied without reference to what a reasonable legislator might want, would lead to pointless outcomes like “spend[ing] billions to save one more fish or plankton.”⁷² Breyer instead preferred a “wholly disproportionate” test that would promote the reasonable demands of Congress in seeking the “best” technology while avoiding results it would not have intended.⁷³

The Court’s presumptions in *Enterpy* are not limited to the canon of the reasonable legislator. The majority and dissent seem to hint at substantive canons in favor and against cost-benefit analysis.⁷⁴ In particular, the majority opinion rests on a presumption that Congress authorized agencies to make cost benefit determinations where it has not specifically foreclosed them.⁷⁵ The canon of the reasonable legislator is not as specific as either a pro or anti cost-benefit canon. Rather, it subsumes both of those canons as potentially acceptable reasonable approaches. The canon of the reasonable legislator does point somewhat in the direction of cost-benefit analysis, but only to the extent that “an absolute prohibition [on considering costs] would bring about irrational results.”⁷⁶ The result is Breyer’s concurrence, which is careful not to inject the Court’s own idea of reasonableness by presuming in favor of or against cost-benefit analysis. Instead, it allows for agency discretion so long as it comports with the boundaries a reasonable legislator would allow while pursuing the goal of seeking the “best technology” to protect the environment.

⁷¹ *Id.* at 232.

⁷² *Id.*

⁷³ *Id.* at 235.

⁷⁴ See Cannon, *supra* note 12, at 433-34.

⁷⁵ *Id.* at 452.

⁷⁶ *Enterpy*, 556 U.S. at 232.

In *Michigan v. EPA*,⁷⁷ the Court would later steer more aggressively in the direction of a cost-benefit analysis canon.⁷⁸ The Court ruled that a Clean Air Act provision requiring the EPA to regulate power plants' emissions if it believes it is "appropriate and necessary" required the agency to conduct cost-benefit analysis.⁷⁹ The presumption behind this holding is that a reasonable legislator would always want an agency to consider costs in determining whether something should be regulated.⁸⁰ The ruling moves away from a Breyer-style canon of the reasonable legislator to a flat out cost-benefit canon. However, Congress can still write statutes directing agencies not to consider cost-benefit at all.⁸¹ When statutory language does explicitly restrict such analysis, the presumption of the reasonable legislator would allow courts to ensure the goal of the law is met and extreme results are discounted, while still falling short of the stricter requirements of a full cost-benefits analysis. It is particularly useful in preventing cases like *Tennessee Valley Authority v. Hill*,⁸² where the Court read statutory language in a maximalist fashion despite Congressional policy priorities that clearly outweighed it.⁸³ Under the canon of the reasonable legislator, the Court would be guided to results that match how Congress rationally prioritizes using finite resources to deal with competing policy issues.

D. The Reasonable Legislator and Nondelegation

⁷⁷ 576 U.S. 743 (2015).

⁷⁸ *Id.*

⁷⁹ *Id.* at 751.

⁸⁰ *Id.* at 752-53 ("Agencies have long treated cost as a centrally relevant factor when deciding whether to regulate. Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions.").

⁸¹ See, *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457 (2001) (holding that a provision in the Clean Air Act requiring the EPA to set air quality standards "requisite to protect the public health with an adequate margin of safety" barred consideration of costs when setting standards).

⁸² 437 U.S. 153 (1978).

⁸³ See *id.* at 172-74 (holding that the language of the Endangered Species Act required the government to halt construction on a major dam to save a species of small fish, even though Congress had continued to appropriate funds to build the dam even after the act was passed and the species discovered).

The canon of the reasonable legislator can also be used to understand the Supreme Court’s nondelegation jurisprudence. In cases where the Court has addressed nondelegation, it has asked if a reasonable legislator would be willing to give up a certain kind of authority to an agency. To explore the logic of nondelegation, imagine Congress established an agency and granted it the power to promulgate any rule consistent with Congress’s own powers under the constitution. Doing so would effectively divest Congress of its authority. Nondelegation argues that this kind of risk creates a constitutional obligation to limit delegation under separation of powers.⁸⁴ As such, courts apply a broad “intelligible principle” test, requiring statutes to hold an administrative agency to some sort of intelligible principle guiding its actions.⁸⁵

This use of nondelegation could just as easily be reframed under the reasonable legislator canon. Rather than enforcing a constitutional separation of powers, the court could be seen as stating that some forms of delegation are so great that no reasonable legislator would agree to them. In this context, the “intelligible principle” requirement looks a lot like the court setting an extreme outer boundary beyond which delegation is unreasonable. Nondelegation under its current, limited use can therefore be seen as promoting a *constitutional ideal* of a reasonable legislator even if actual legislators have failed to meet this standard by passing a statute that over-delegates.⁸⁶ Even if nondelegation has weak roots in the constitution’s text and history,⁸⁷ courts can still justify rejecting a statute that violates the spirit of the Congress’s constitutional role as a reasonable body charged with making law.

⁸⁴ *American Trucking*, 531 U.S. at 472 (“Article I, § 1, of the Constitution vests ‘[a]ll legislative Powers herein granted [...] in a Congress of the United States.’ This text permits no delegation of those powers.”).

⁸⁵ *Id.*

⁸⁶ “It is possible to generate a series of interpretive principles, all with support in current law, that can promote the goals of deliberative government [...] In this way, statutory construction can serve as an ally of other, more ambitious strategies designed to promote some of the original constitutional goals.” Sunstein, *Interpreting Statutes*, *supra* note 11, at 505.

⁸⁷ For such an argument, see Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021).

Since the New Deal era, the Supreme Court has consistently rejected attempts to overturn statutes explicitly on nondelegation grounds.⁸⁸ However, there have been cases that have hinted at nondelegation while applying the canon of the reasonable legislator to limit agency action.⁸⁹ In *Industrial Union Department, AFL-CIO v. American Petroleum Institute*,⁹⁰ also known as the Benzene Case, the Court limited the Occupational Health and Safety Administration (OSHA)'s ability to regulate toxic substances in workplaces to situations where there is no "significant risk of harm."⁹¹ OSHA had promulgated a rule limiting allowable concentrations of benzene to a point that would cost industry millions, but where it was unclear that there would be any additional health benefits to workers.⁹² The Court, examining OSHA's statutory authority to make standards "reasonably necessary or appropriate to provide safe or healthful employment," found that this exercise of authority required there to be some meaningful degree of risk.⁹³ The Court didn't think Congress had intended to grant such authority, as "in the absence of a clear mandate in the Act, it is unreasonable to assume that Congress intended to give [OSHA] unprecedented power over American industry."⁹⁴ If it had intended to do so, it might violate nondelegation.⁹⁵ The Court's nondelegation argument is in large part predicated on the unreasonableness of the relevant regulations, writing "the Government's theory would give OSHA power to impose enormous costs that might produce little, if any, discernible benefit."⁹⁶

⁸⁸ See *Gundy v. United States*, 139 S. Ct. 2116, 2130-31 (2019) (Alito, J., concurring).

⁸⁹ In addition to the canon of the reasonable legislator, there are also other substantive canons tied to the nondelegation doctrine that limit agency action without directly overturning congressional delegation. See generally, Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).

⁹⁰ 448 U.S. 607 (1980) (plurality opinion).

⁹¹ *Id.* at 614-15.

⁹² *Id.* at 628-38.

⁹³ *Id.* at 642.

⁹⁴ *Id.* at 645.

⁹⁵ *Id.* at 646.

⁹⁶ *Id.* at 645.

In effect, the Court sees no justification for why a reasonable legislator would delegate the power to make enormously impactful rules for no reason.

A similar result occurred in *Kent v. Dulles*,⁹⁷ where the Supreme Court heard a challenge to the State Department's decision to deny passports to members of the Communist Party.⁹⁸ The Court did not take issue with the underlying statutory authority granted by Congress to the State Department to issue passports under rules set by the President.⁹⁹ However, it was disturbed by idea that this open ended provision meant Congress would delegate away an essential constitutional liberty such as the right to travel.¹⁰⁰ If Congress wanted to do so, the Court held that it would have to say so explicitly.¹⁰¹ Just as the Benzene Case presumes a reasonable legislator wouldn't easily delegate authority with disproportionately negative economic effects, *Kent* operates from a presumption that a reasonable legislator would not easily give up their authority in ways that would fundamentally harm constitutional liberties.

Although nondelegation is not being used to overturn statutes yet, the major questions doctrine has officially carved out an exception to *Chevron* and is becoming a key mechanism used by courts to limit the power of the administrative state.¹⁰² While this doctrine can also be understood in light of the canon of the reasonable legislator, it is much more aggressive. The major questions doctrine takes the same approach that the canon of the reasonable legislator does in considering legislative intent when reviewing agency action. However, where the canon of the reasonable legislator imagines a rational lawmaking body that could reach multiple conclusions,

⁹⁷ 357 U.S. 116 (1958).

⁹⁸ *Id.* at 118-20.

⁹⁹ *Id.* at 123.

¹⁰⁰ "Since we start with an exercise by an American citizen of an activity included in constitutional protection, we will not readily infer that Congress gave the Secretary of State unbridled discretion to grant or withhold it." *Id.* at 129.

¹⁰¹ *Id.* at 130.

¹⁰² See *West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

the major questions doctrine attributes to legislators an adherence to a strict, idealized separation of powers regime.¹⁰³ While the canon of the reasonable legislator is meant to effectuate statutory purpose, the major questions doctrine artificially limits the administrative state. It demands explicit statements from Congress based on criteria like major economic effect even when an agency action is clearly meant to address the goals of a statute.¹⁰⁴ This differs substantially from the lighter nondelegation framework seen in the *Benzene Case*, where the Court’s denial of agency authority was predicated on how unreasonable it would be for Congress to defer enormous power only where there is no tangible benefit. The canon of the reasonable legislator, as applied to administrative law, is a way to resolve failures in deference and delegation that Congress could not have wanted and that would ultimately harm the administrative state.

V. CRITIQUES OF THE CANON OF THE REASONABLE LEGISLATOR

A. Textualist Critiques

As a fundamentally purposivist theory, there are grounds for textualists to take issue with the canon of the reasonable legislator. The most immediate textualist critique of the canon is to take issue with the broad meaning of the term “reasonable.”¹⁰⁵ Defined too capaciously, any decision by the legislature is reasonable and the canon has no purpose. Defined too narrowly, reasonableness enables judges to pick and choose their policy preferences on the grounds that anything else is “unreasonable.” Taking *Michigan v. EPA* as an example, one judge that dislikes cost-benefit analysis might argue a reasonable legislator would never want regulations to go through that process without explicitly saying so. Another judge that likes cost-benefit analysis

¹⁰³ See *id.* at 2617 (Gorsuch, J. Concurring) (“The major questions doctrine works [...] to protect the Constitution’s separation of powers”).

¹⁰⁴ See *id.* at 2621 (“an agency must point to clear congressional authorization when it seeks to regulate ‘‘a significant portion of the American economy’’”) (quoting *Utility Air*, 573 U.S., at 324).

¹⁰⁵ “The problem with the reasonable legislator approach is that ‘reasonableness’ covers a lot of ground.” Manning, *Reasonable Legislator*, *supra* note 8, at 466

would instead presume a reasonable legislator would always want agencies to engage in cost-benefit analysis when making regulations unless specified otherwise. Even when a degree of latitude is set, there are inevitably going to be multiple acceptable views of what a reasonable legislator wants.¹⁰⁶

The canon of the reasonable legislator is not supposed to import a court's own definition of what is and isn't reasonable.¹⁰⁷ Nevertheless, judges will have to decide on their own what conclusions a reasonable legislator would come to in pursuing his or her goals. While this generates the risk of making law by judicial fiat, that is an inherent risk in all statutory interpretation. Any canon of construction can either be abused or read out of existence if a mistaken or unscrupulous judge so wishes.¹⁰⁸ The goal of canons of statutory interpretation, including the canon of the reasonable legislator, is to create a general roadmap of reasoning that judges may use to consistently interpret the law. The canon of the reasonable legislator is meant only to guide judges in upholding the purpose of the statute, and it is this limitation that should prevent judges from exercising their power too broadly. When determining what is outside the boundaries a reasonable legislator would allow in pursuing that purpose, courts should adopt a framework similar to that of Breyer's concurrence in *Entergy* and bar only "wholly disproportionate" actions.¹⁰⁹ Deciding what counts as "wholly disproportionate" can likewise be a difficult standard for a court to set, but judges can look to social consensus and tread lightly to ensure it is not misused.¹¹⁰

¹⁰⁶ See *infra* sections III. B. and C.

¹⁰⁷ HART AND SACKS, *supra* note 2, at 1378.

¹⁰⁸ See, e.g., James J. Brudney & Corey Distlear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 111 (2005) ("The malleability of these language canons, and the uncertain weight and cyclical fashionability of certain substantive canons, should serve as a warning against unduly ambitious claims on their behalf").

¹⁰⁹ See *Entergy*, 556 U.S. at 235.

¹¹⁰ See Sunstein, *Interpreting Statutes*, *supra* note 11, at 488 (discussing a "proportionality principle," particularly when reviewing agencies' economic regulations).

The canon of the reasonable legislator also avoids a traditional textualist critique of using legislative intent in statutory interpretation. Textualists argue that there is no singularly identifiable legislative intent in a body made up of many legislators with multivarious goals and constraints.¹¹¹ Even if there is a single intent, it is hard to divine, and legislative history provides an imperfect and easily manipulable set of clues.¹¹² Presuming a reasonable legislator does impute intent to the legislative body, but it does so on a completely different basis. Rather than examining the subjective wishes of particular legislators and using that to decide overall intent, the canon of the reasonable legislator assigns an intention to the entire body based on its institutional purpose. While the canon does attempt to find purpose based on context, it still embraces the textualist critique of attributing one intention to multiple actors, and instead openly attributes a principled intent to the entire institution.¹¹³ Legislators are reasonable because they must be in a well-functioning legal order.¹¹⁴

B. Intent Based Critiques

A more targeted critique challenges the very idea that a legislator should be assumed to be reasonable. Some argue that determining the purpose of a statute requires considering the ends of the actual legislators who made it rather than what a judge perceives the goal of the statute to be.¹¹⁵ These real legislators are not necessarily reasonable. Academics and the public

¹¹¹ See, e.g., Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J. L. & PUB. POL'Y. 61, 68 (1994).

¹¹² *Id.* at 61-62.

¹¹³ John F. Manning, *What Divides Textualists from Purposivists?* 106 COLUM. L. REV. 70, 91 (2006) [hereinafter Manning, *Textualists from Purposivists*] (“the theory of Legal Process purposivism, much like that of modern textualism, treats the attribution of meaning as a construct.”).

¹¹⁴ Textualists also employ similar ideal figures to support their conception of the judiciary’s role by considering statutory text from the perspective of a reasonable reader or a reasonable drafter. See generally, Cory R. Liu, note, *Textualism and the Presumption of Reasonable Drafting*, 38 HARV. J. L. PUB. POL'Y. 711 (2014).

¹¹⁵ This has been described elsewhere as a divide between “purposivists” and “intentionalists.” See Bradford C. Mank, *Textualism’s Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 KENT. L. J. 527, 528-31.

have long recognized that legislation is not only driven by public interest ends, but also by the desires of interest groups that can influence legislative outcomes.¹¹⁶ Statutes are the product of compromise, between lawmakers and between various interests that have a stake in their outcome. They can be interpreted “as a contract” between multiple groups.¹¹⁷ One response to this interpretation is to argue that judges must recognize the unreasonable root of laws to faithfully enforce them.¹¹⁸ If lawmaking is about compromise between interest groups, then that is the institutional framework that courts should uphold.¹¹⁹ If judges later apply the statute to achieve more than the compromise intended with the aim of effectuating the statute’s goal, then the judge has actually upset “the balance of the package.”¹²⁰

There are both normative and descriptive problems with the contractual approach to reviewing statutes. Descriptively, the rational legislator has an element of truth in it. The compromises inherent in the production of legislation do not imply that the legislators themselves have entirely ceased to act reasonably.¹²¹ The public interest is as much an influence on legislators as the desires of outside groups and the necessities of compromise.¹²² There are also problems with applying the contractual model. Viewing a statute as a contract does not, without reference to some other reasonable purpose, enable judges to resolve statutory uncertainties.¹²³ Finally, even if it is objectively true that a legislator intends to act unreasonably,

¹¹⁶ See, e.g., Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 265-66 (1982); Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 GEO. L.J. 1119, 1148-49 (2011).

¹¹⁷ Frank H. Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 15.

¹¹⁸ See *id.* at 60 (1984) (“Judges must be honest agents of the political branches. They carry out decisions they do not make”).

¹¹⁹ See *id.* (“Good judges make it easier for the political branches to strike compromises, to enact new laws.”).

¹²⁰ See Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 540 (1983).

¹²¹ See RICHARD EKINS, *THE NATURE OF LEGISLATIVE INTENT* 236-243 (2012).

¹²² See *Id.*

¹²³ See Sunstein, *Interpreting Statutes*, *supra* note 11, at 448 (“In many cases, the terms of any deal will be hopelessly unclear in the absence of background norms that a system of interpretation – one that has nothing to do with deals – alone can supply”).

courts have no obligation to be beholden to their impropriety. The formulation of the reasonable legislator is not a claim about the actions of real legislators.¹²⁴ The canon of the reasonable legislator takes an objective perspective. It is utterly uninterested in anyone's subjective experience as a legislator.¹²⁵ As a multi-member body where everyone has an equal vote, the subjective intent of legislators is not the intent of the legislature.¹²⁶ The law is no stranger to "reasonable people," and along with that standard has come a long history of critique.¹²⁷ However, much more than in the common law, the goal of imagining the reasonable legislator is to impose an institutional role model.¹²⁸

By presuming reasonability, courts can build a superior system. Judicial interpretation moves policy in a direction more aligned with the national interest and less with special interests.¹²⁹ This may be an inaccurate reflection of Congress empirically, but judges are public servants, not scientists. Their goal is to uphold the institution of our constitutional order, not to accurately describe the vicissitudes of legislative practice.¹³⁰ As an interpretive guide for judges, a canon should aim to do the same.¹³¹ As reasonable interpretation leads to reasonable law, the

¹²⁴ See Peter L. Strauss, *The Common Law and Statutes*, 70 U. COLO. L. REV. 225, 241-42 (1999) ("If [the reasonable legislator] is a normative statement prescribing proper attitudes for judges in their dealing with the work of legislatures, rather than a positive one describing what legislatures are, then it is not so trivially susceptible of disproof").

¹²⁵ See Manning, *Textualists from Purposivists*, *supra* note 113, at 90-91.

¹²⁶ See generally, Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 DUKE L. J. 979 (2017).

¹²⁷ See Mayo Moran, *The Reasonable Person: A Conceptual Biography in Comparative Perspective*, 14 LEWIS & CLARK L. REV. 1233, 1234-37 (2010).

¹²⁸ HART AND SACKS, *supra* note 2, at 1378.

¹²⁹ "The judiciary, using traditional methods of statutory interpretation, *inevitably* checks legislative excess by serving as a mechanism that encourages passage of public- regarding legislation and impedes passage of interest group bargains." Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 226 (1986).

¹³⁰ "The court should not [infer purpose] in the mood of a cynical political observer, taking account of all the short-run currents of political experience that swirl around any legislative session." HART AND SACKS, *supra* note 2, at 1378.

¹³¹ See Sunstein, *Interpreting Statutes*, *supra* note 11, at 451.

presumption becomes self-reinforcing. Truth is not confined to a description of the way things are. It can also describe the way things should be.¹³²

V. CONCLUSION

The Legal Process tradition has not left us entirely. Even in an era defined by the success of textualism, judges cannot escape considerations of purpose or normative propositions about the way our institutions should work. The idea of a reasonable legislator behind every statute has remained with the law. Such a background presumption is best described as a canon. Though canons, particularly those that are substantive, have valid critiques, they remain an essential interpretive guide for judges examining statutes.

A judge using the canon of the reasonable legislator to examine a statute will not always arrive at the same result. Numerous presumptions about congressional intent can simultaneously exist under the heading of what a reasonable legislator might allow. Instead, the canon is a method of reasoning that allows for judges' decisions to better reflect how lawmaking institutions should operate. The fact that its scope is broad gives it an advantage over more particular substantive canons in reflecting legislative intent, especially in administrative law. It empowers regulatory agencies to operate, even where their decisions have major consequences, but it also enables judges to curtail agency action in egregious circumstances. To the extent that the administrative state must be disciplined by the courts, the canon of the reasonable legislature provides a responsible basis to do so.

What the canon cannot do is create a perfect encapsulation of congressional purpose. It is not able to resolve philosophical debates about the true intentions behind statutes crafted by

¹³² Cass R. Sunstein, *Principles, Not Fictions*, 57 U. CHI. L. REV. 1247, 1257 (1990) (“if this premise [of the reasonable legislator] is defended, in principle, as a means of improving the legal system by assuming and thus helping to produce reasonableness and sense rather than chaos and nonsense, [...] in that event, the assumption of reasonableness is not rooted in fictions at all.”).